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July 14, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Via Hand Delivery

Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation by Intermedia Communications Inc.

In the Matter of:	)	
	)	
Access Charge Reform	)	**Docket No. 96-262**
	)	
Petition of U S West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	**Docket No. 98-157**
	)	
SBC Companies For Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Specified MSAs	)	**Docket No. 98-227**
	)	
Petition of Bell Atlantic Telephone Companies For Forbearance from Regulation as a Dominant Carriers in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, D.C.; Vermont; and Virginia	)	**Docket No. 99-24**

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Petition of Ameritech For Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA	))))	**Docket No. 99-65**

Dear Ms. Salas:

Pursuant to Section 1.1206(b)(1) of the Commission's Rules, the Intermedia Communications Inc. ("Intermedia") submits this notice in the above-captioned docketed proceedings of a written *ex parte* presentation.

Attached is copy of the Intermedia position paper on additional incumbent local exchange carrier ("ILEC") pricing flexibility. The position paper addresses issues raised by the Petitions for Forbearance from price regulation filed by a number of incumbent local exchange carriers ("ILECs") in the above-captioned proceedings. Specifically, the position paper discusses the anticompetitive results that could occur if the Commission permits ILECs to price Special Access services at average variable cost, while pricing unbundled network elements at total element long run incremental cost.

Pursuant to the Commission's rules, Intermedia submits an original and two (2) copies of this written *ex parte* notification and attachment for inclusion in the public record of the above-referenced proceedings. If you have any questions or need additional information, please contact me at (202) 955-9881.

Respectfully submitted,

Michael B. Hazzard

Enclosure

cc: Lawrence Strickling, Chief, Common Carrier Bureau
Robert Atkinson, Deputy Chief, Common Carrier Bureau
Jane Jackson, Chief, Competitive Pricing Division
Tamara Preiss, Competitive Pricing Division
Jay Atkinson, Competitive Pricing Division
International Transcription Service

INTERMEDIA COMMUNICATIONS INC.
POSITION PAPER ON ADDITIONAL ILEC PRICING FLEXIBILITY

JULY 14, 1999

I. Summary

Any initiative to provide incumbent local exchange carriers ("ILECs") additional pricing flexibility for Special Access service pricing must consider the potential impact of such pricing flexibility on the development of local competition. As described in this position paper, any expanded pricing flexibility adopted by the Commission must guard against unreasonable discrimination against CLECs.

To prevent discrimination, the Commission should be aware that ILECs could use pricing flexibility as a tool to work a "price squeeze" against CLECs. Pricing flexibility could result in a situation where ILECs are able to offer Special Access service arrangements to end users at average variable cost ("AVC") while CLECs are required to purchase analogous facilities at total element long run incremental cost ("TELRIC"). Because AVC does not include all of the cost components of TELRIC rates, such as depreciation, joint and common costs, and reasonable profit, AVC costs <u>will always be lower</u> than TELRIC costs. This pricing differential will result in a classic price squeeze unless the Commission takes action to mitigate potential predatory pricing. To protect against such a price squeeze, the Commission should require ILECs to publish and make available at resale rates all contract service arrangements ("CSAs"), volume discount plans, and similar "individual case" offerings.

II. Any Pricing Flexibility Rules Adopted by the Commission Must Prevent Unreasonable Discrimination

Despite the availability of unbundled network elements ("UNEs") and collocation, most CLECs still rely on Special Access to serve their customers for a variety of operational reasons. For example, ILECs provide shorter provisioning intervals and higher service quality for Special Access than for UNEs. ILECs typically provision DS1 Special Access in three-to-five days, whereas DS1 UNE loops often take six weeks to provision. As for service quality issues, ILECs provide CLECs with service quality guarantees under Special Access arrangements, but do not do so for UNEs. In addition, ILECs install Special Access for CLECs without disruption to end-user customers. With UNEs, customers always experience loss of service. Moreover, in cases where collocation is required, even under the FCC's new collocation rules, it can take 10 weeks or more before a CLEC is able to order a DS1 UNE.[1]

These service considerations mean that CLECs can't rely on UNEs due to delays and disruption, particularly in a competitive market situation. ILECs have continuously

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[1] *See, e.g.*, New York Telephone Company, Tariff P.S.C. 914 – Telephone, § 5.1.4(D) (indicating a 76 day interval for physical collocation) (attached hereto as Tab A).

sabotaged collocation and UNE processes to deny their effective use by CLECs, forcing CLECs to rely on Special Access rather than UNEs. Permitting such a result to continue would allow the ILECs to foreclose CLEC entry into local markets through one of the three pathways envisioned by Congress – UNEs.

III. Any Grant of ILEC Customer-Specific Pricing Authority Must Be Accompanied by Standards that Prevent ILECs' Ability to Establish a Price Squeeze

Setting a price floor for ILEC retail and wholesale services at AVC will create a price squeeze against facilities-based CLECs that purchase UNEs. As a general matter, AVC is thought to be the minimum price needed for the recovery of costs necessary to produce goods. Pricing below AVC would indicate that a company is charging less for a finished good or service than the average cost of the inputs used to produce the good or service, which strongly suggests predatory pricing. The Supreme Court has defined predatory pricing as either "(i) pricing below the level necessary to sell ... products, or (ii) pricing below some appropriate measure of cost."[2] With regard to properly measuring cost, the Sixth Circuit has found that pricing below marginal cost or AVC is presumptively illegal, and pricing above marginal cost or AVC is presumptively legal.[3] Indeed, for the last decade, the FCC has used AVC to set price floors for ILEC wholesale and retail services.[4]

While AVC covers only the average variable costs associated with producing a good or service, the Commission's TELRIC standard – the pricing standard for UNE rates – includes additional costs, including joint and common costs, depreciation, and a reasonable profit.[5] As such, TELRIC rates always will be higher than AVC rates. Permitting ILECs to set Special Access rates at AVC would undercut TELRIC-based UNE rates, which would essentially codify a classic "price squeeze" against CLECs seeking to enter local markets using "cost-based" UNEs made available under the Act's unbundling provision, section 251(c)(3).

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2 *Cargill Inc. v. Monfort of Colorado*, 107 S.Ct. 484, 493 n.12 (1986) (attached hereto as Tab B).

3 *Arthur S. Langederfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050, 1056-57 (1984) (attached hereto as Tab C).

4 *See Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3114-15 (1989) (adopting AVC as a pricing floor) (attached hereto as Tab D). *See also, GTE Telephone Operating Companies Investigation of Below-band Transport Rates*, 10 FCC Rcd 1573, 1574-75 (1994) (placing "great weight" on whether GTE's tariff rate covers AVC to "check against predation," and noting that variable costs should include "all access charges and billing and collection costs attributable to the service, as well as other non-fixed costs which would not be incurred if the service were not offered") (citation omitted) (attached hereto as Tab E).

5 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Memorandum Opinion and Order, 11 FCC Rcd 15499, 15850-56 (1996) ("*Local Competition Order*") (attached hereto as Tab F).

A price squeeze already is occurring for advanced services. For example, U S WEST currently offers "DS1 Capable Loop" UNEs at $90.50 per month.[6] Because U S WEST's loops are bottleneck facilities, competitors must purchase these loops in order to compete with U S WEST's advanced service offerings. Yet U S WEST's tariffed ADSL services are priced at:

- $57.20 - $65.00 for 512 Kbps service,
- $70.40 - $80.00 for 768 Kbps service, &
- $110.00 - $125.00 for 1 Mbps service.[7]

For the higher capacity service, the cost of the loop alone exceeds the price of the services against which CLECs must compete. When the additional TELRIC costs of collocation and cross-connects are included, there can be no question that the TELRIC costs of essential components are higher than U S WEST's current rates for services against which CLECs will compete.

This price squeeze issue has been pending before the Commission at least since the initiation of the section 706 rulemaking proceeding in CC Docket No. 98-147. In that proceeding, for example, NorthPoint Communications described the price squeeze at issue as follows:

> A price squeeze exists whenever a competitor that is equally efficient at providing the competitive portions of a service cannot, without losing money, meet the incumbent's retail price given the price(s) that it must pay to the incumbent for any bottleneck input(s) available only from the incumbent. A price squeeze can be the result of the markup over direct economic cost [*i.e.*, marginal cost or AVC] that the incumbent imposes for bottleneck inputs that both it and the competitor use or the incumbent's imposition of costs on the competitor that the incumbent does not bear at all. To avoid a price squeeze, the incumbent's retail price must equal or exceed the sum of the price that it charges to competitors for the bottleneck input(s) plus the total service long-run incremental cost of the competitively provided portions of the service.[8]

The existence of AVC pricing for Special Access and TELRIC pricing for UNEs would sanction an ILEC price squeeze on competitors. As discussed below, permitting resale of Special Access, including Special Access CSAs, would be the surest way to thwart any potential predatory price squeeze without entangling the Commission in on-going complaint proceedings regarding the reasonableness of ILEC rates.

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6 U S WEST written *ex parte* in CC Docket No. 98-157 & 99-1 (Apr. 8, 1999) (attached hereto as Tab G).

7 U S WEST, Tariff F.C.C. No. 5, § 8.4.3 page 8-114 (attached hereto as Tab H).

8 CC Docket No. 98-147, Comments of NorthPoint Communications, Inc. at 36 (Sept. 25, 1999) (attached hereto as Tab I).

IV. Public Disclosure of Customer-Specific Rates and Full Implementation of the Resale Provisions of the Communications Act Are Essential to Prevent Anticompetitive Abuse of Customer-Specific Pricing Authority

The existence of different pricing standards for Special Access and UNEs raises considerable problems. But rather than require extensive cost analyses or invite parties to initiate rate complaints that could embroil the FCC, it should instead require full disclosure of Special Access CSAs through publication and permit resale of such arrangements, pursuant to the avoided cost standard of section 251(c)(4). By taking such action, the FCC would effectively allow the industry to police itself, as ILECs will not price at predatory levels if Special Access CSAs are subject to resale.

A. All customer-specific rates must be published

To ensure compliance with any FCC-set cost floors and resale requirements, ILECs must be required to publish the general terms and conditions of Special Access CSAs. At a minimum, this would require ILECs to post rates on their websites, consistent with the FCC's recent truth in billing rules. Similar to AT&T Tariff No. 12, ILECs would not have to identify customers, but they would have to identify all types of services being offered, and the rates for each type of service. Critical items that ILECs must make available in any posted CSA include: (1) types of services, (2) volume commitments, (3) term, (4) quality of service guarantees, and (5) geographic area covered, including any rate zones. Unregulated services or functions may be included; however, these items must be priced separately, and the bundling of unregulated services in a CSA should in no way foreclose a CLEC from reselling a CSA.

B. Wholesale services must be available to CLECs for resale

In addition to requiring publication, CSAs and other Special Access wholesale offerings must be available for resale. Intermedia understands that the Commission up to this point has not required ILECs to resell exchange access services because the "vast majority" of purchasers of interstate access service are telecommunications providers, who are not permitted to purchase for their own use ILEC wholesale services.[9] However, the Commission did note that "end users do occasionally purchase some access services,"[10] and for these end users, the Commission should permit competitive carriers to purchase exchange access services at wholesale rates for resale. Moreover, in its section 706 Notice of Proposed Rulemaking, the Commission tentatively concluded that ILEC advanced services – which are interstate access services – should be made available to competitors at wholesale rates pursuant to the resale provision of the Act.[11] To limit the possibility of the price squeeze described above, the Commission should extend this analysis to all Special Access services – including CSAs and

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9 *Local Competition Order*, 11 FCC Rcd at 15934-5, ¶ 873 (attached hereto as Tab J).

10 *Id.*

11 *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 98-188, (Memorandum Opinion & Order and Notice of Proposed Rulemaking), (rel. Aug. 7, 1998), ¶¶ 188-89 (attached hereto as Tab K).

volume discount plans – and require resale pursuant to the avoided cost standard of section 251(c)(4).[12] Doing so is fully consistent with the Communications Act, and would encourage the industry to police itself, rather than engage in protracted rate litigation.

As noted in the Commission's rules, resale restrictions are presumed unreasonable unless an ILEC "proves to the state commission that the restriction is reasonable and nondiscriminatory."[13] Indeed, the Commission rejected two BellSouth applications for section 271 relief in part because failure to offer CSAs at a state commission-approved wholesale rate violates the section 271 competitive checklist.[14] Not until BellSouth modified its Louisiana statement of generally available terms and conditions to apply the state wholesale discount rate to CSAs did the Commission find that BellSouth had satisfied its obligation to resell services at state commission-set rates.[15]

In the *Local Competition Order*, the Commission specifically considered and rejected ILEC claims that CSAs and volume offerings should be excluded from resale.[16] As the Commission noted, "[i]f a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service."[17] In addition, in the *BellSouth South Carolina Order*, the Commission expressly rejected BellSouth's argument that application of the state commission-set wholesale discount to CSAs would overstate the costs avoided because ordinary marketing costs are not incurred for individually negotiated arrangements.[18] In fact, Intermedia submits that the avoided cost of ILEC CSA arrangements would actually be greater than that of standard offerings because CSAs require ILECs to develop business cases to ensure that customers qualify for a CSA and to implement special billing arrangements unique to the CSA customer.

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12 *See, e.g.*, CC Docket 98-147, Comments of Intermedia Communications Inc. at 60 (attached hereto as Tab L).

13 47 C.F.R. § 51.613(b) (attached hereto as Tab M).

14 *See Application of BellSouth, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended to Provide In-Region, InterLATA Services in South Carolina*, 13 FCC Rcd 539, 657-63 (1997) ("*BellSouth-South Carolina Order*") (attached hereto as Tab N); *see also Application of BellSouth, et al. Pursuant to Section 271 of the Communications Act of 1934, as Amended to Provide In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 6245, 6281-88 (1997) (attached hereto as Tab O).

15 *See Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, FCC 98-271, (Memorandum Opinion and Order), rel. Oct. 13, 1998), ¶¶ 310-11 (attached hereto as Tab P).

16 *Local Competition Order*, 11 FCC Rcd at 15971 (attached hereto as Tab Q).

17 *Id.*

18 *BellSouth-South Carolina Order*, 13 FCC Rcd at 661-62 (attached hereto as Tab R).

C. Volume and term discounts must be made available to carriers on a nondiscriminatory basis

Unless volume and term discounts are made available to all competitors on a nondiscriminatory basis, mega-carriers will have the ability to enter "sweetheart" deals with one another that only they can generate. Such a result would be discriminatory by freezing out smaller carriers, including regional carriers.

Failure to make volume and term discount plans available on a nondiscriminatory basis would be bad telecom policy because it would encourage the biggest carriers to consolidate in favorable arrangements. In addition, such a failure would be bad economic policy, as it assumes cost economies are in a straight linear relationship that never caps out or otherwise experiences "diminishing returns." To correct these potential problems, the Commission should limit maximum volume discounts to traffic generated within a state. Doing so would permit ILECs to reflect legitimate volume cost savings in their rates and keep volume discounts open to a wide array of small and regional carriers – typical CLECs may not be able to match volumes nationwide or within an ILEC region, but may be able to match volumes of the largest carriers in a given state. Constraining volume discounts to the state level also is consistent with the volume and term discount schedules currently tariffed by most ILECs, which are made on a state by state basis.

volume discount plans – and require resale pursuant to the avoided cost standard of section 251(c)(4).[12] Doing so is fully consistent with the Communications Act, and would encourage the industry to police itself, rather than engage in protracted rate litigation.

As noted in the Commission's rules, resale restrictions are presumed unreasonable unless an ILEC "proves to the state commission that the restriction is reasonable and nondiscriminatory."[13] Indeed, the Commission rejected two BellSouth applications for section 271 relief in part because failure to offer CSAs at a state commission-approved wholesale rate violates the section 271 competitive checklist.[14] Not until BellSouth modified its Louisiana statement of generally available terms and conditions to apply the state wholesale discount rate to CSAs did the Commission find that BellSouth had satisfied its obligation to resell services at state commission-set rates.[15]

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C. Volume and term discounts must be made available to carriers on a nondiscriminatory basis

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15 *See Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, FCC 98-271, (Memorandum Opinion and Order), rel. Oct. 13, 1998), ¶¶ 310-11 (attached hereto as Tab P).

16 *Local Competition Order*, 11 FCC Rcd at 15971 (attached hereto as Tab Q).

17 *Id.*

18 *BellSouth-South Carolina Order*, 13 FCC Rcd 539, 657-63 (1997) (attached hereto as Tab R).

A

NETWORK INTERCONNECTION SERVICES

REGULATIONS, RATES AND CHARGES

Applying to the provision of Network Interconnection
Services to Certified Local Exchange Carriers
Within the operating territory of the
NEW YORK TELEPHONE COMPANY
in the State of New York

Network Interconnection Services are provided by means of wire, fiber optic, radio or any other suitable technology or a combination thereof.

Issued in compliance with Order of the Public Service Commission, dated September 27, 1995 in Case No. 94-C-0095.
Issued: October 19, 1995 Effective: October 20, 1995
By Sandra DiIorio Thorn, General Attorney
1095 Avenue of the Americas, New York, N.Y. 10036

NETWORK INTERCONNECTION SERVICES

5. Collocation (Cont'd)

5.1 Physical Collocation (Cont'd) (N)

5.1.4 Joint Planning and Implementation Intervals (Cont'd) (N)

(D) The following standard implementation milestones will apply unless the Telephone Company and the CLECs jointly decide otherwise.

- Day 1 -- CLEC submits completed application (N)
- Day 9 -- The Telephone Company notifies CLEC that request can be accomodated and estimates costs. (N)
- Day 14 --CLEC notifies the Telephone Company of its intent to proceed and submits 50% payment as set forth in 5.1.4(B) preceding, or provides written agreement agreeing to reimburse the Telephone Company for all costs incurred should the CLEC withdraw its collocation request. (N)
- Day 76 --The Telephone Company and CLEC attend Methods and Procedures Meeting and the Telephone Company turns over the multiplexing node to the CLEC. (N)

The Telephone Company and the CLECs shall work cooperatively in meeting these milestones and deliverables as determined during the joint planning process. A preliminary schedule will be developed outlining major milestones. In Physical Collocation, the CLEC and the Telephone Company control various interim milestones they must meet to meet the overall intervals. The interval clock will stop, and the final due date will be adjusted accordingly, for each milestone the CLEC misses (day for day). When the Telephone Company becomes aware of the possibility of vendor delays, it will first contact the CLEC(s) involved to attempt to negotiate a new interval. If the Telephone Company and the CLEC cannot agree, the dispute will be submitted to the Director of the Communications Division of the PSC for prompt resolution. The Telephone Company and the CLEC shall conduct additional joint planning meetings, as reasonably required, to ensure all known issues are discussed and to address any that may impact the implementation process. (N)

(E) Prior to the CLEC beginning the installation of its equipment, the CLEC must sign the Telephone Company work completion notice, indicating acceptance of the multiplexing node construction work and providing the Telephone Company with a security fee, if required, as set forth in Section 5.5.5 following. Payment is due within thirty (30) days of bill date. The CLEC may not install any equipment or facilities in the multiplexing node(s) until after the receipt by the Telephone Company of the Telephone Company work completion notice and any applicable security fee. (N)

Issued in compliance with Order of the Public Service Commission dated March 2, 1998 in Case Nos. 95-C-0657, 94-C-0095, 91-C-1174 and 96-C-0036.

Issued: April 17, 1998 Effective: May 2, 1998
By Sandra DiIorio Thorn, General Counsel
1095 Avenue of the Americas, New York, N.Y. 10036

B

CARGILL, INC. and Excel Corporation, Petitioner
v.
MONFORT OF COLORADO, INC.

No. 85-473.

Supreme Court of the United States

Argued Oct. 6, 1986.

Decided Dec. 9, 1986.

Nation's fifth largest beef packer brought action under Clayton Act to enjoin merger between second and third largest beef packers. The United States District Court for the District of Colorado, Sherman G. Finesilver, J., 591 F.Supp. 683, granted relief, and defendants appealed. The Court of Appeals, Tenth Circuit, 761 F.2d 570, affirmed. On writ of certiorari, the Supreme Court, Justice Brennan, held that: (1) in order to seek injunctive relief under Clayton Act private plaintiff must allege threatened loss or damage of type antitrust laws were designed to prevent; (2) loss of profits that plaintiff would sustain due to possible price competition following merger was not antitrust injury necessary to enjoin merger under Clayton Act; (3) plaintiff's allegations were insufficient to show threat of antitrust injury resulting from predatory pricing; but (4) competitors will not be denied standing to challenge acquisitions on basis of predatory pricing theories.

Reversed and remanded.

Justice Stevens filed dissenting opinion in which Justice White joined.

Justice Blackmun took no part in the consideration or decision of this case.

[1] MONOPOLIES ⚷28(1.6)
265k28(1.6)
Showing of antitrust injury is necessary, but not always sufficient, to establish standing under section of Clayton Act providing for recovery of treble damages, because party may have suffered antitrust injury but may not be proper party under that section for other reasons. Clayton Act, § 4, as amended, 15 U.S.C.A. § 15.

[2] MONOPOLIES ⚷28(1.6)
265k28(1.6)
In order to protect against multiple lawsuits and duplicative recoveries, court should examine other factors in addition to antitrust injury, such as potential for duplicative recovery, complexity of apportioning damages, and existence of other parties that have been more directly harmed, to determine whether party is proper plaintiff under section of Clayton Act providing for recovery of treble damages. Clayton Act, § 4, as amended, 15 U.S.C.A. § 15.

[3] MONOPOLIES ⚷28(1.6)
265k28(1.6)
Because standing under section of Clayton Act permitting private parties threatened with loss or damage by antitrust violation to seek injunctive relief raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to determination of standing under section of Act relating to award of treble damages are not relevant. Clayton Act, §§ 4, 16, as amended, 15 U.S.C.A. §§ 15, 26.

[4] MONOPOLIES ⚷24(7.1)
265k24(7.1)
Formerly 265k24(7)
In order to seek injunctive relief under section of Clayton Act permitting private parties threatened with loss or damage by antitrust violation to seek injunctive relief, private plaintiff must allege threatened loss or damage of type antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful. Clayton Act, § 16, as amended, 15 U.S.C.A. § 26.

[5] MONOPOLIES ⚷24(7.1)
265k24(7.1)
Formerly 265k24(7)
Loss of profits that country's fifth largest beef packer would allegedly sustain due to possible price competition following merger between second and third largest beef packers was not antitrust injury necessary to enjoin merger under Clayton Act. Clayton Act, § 16, as amended, 15 U.S.C.A. § 26.

[6] MONOPOLIES ⚷24(7.1)

265k24(7.1)
Formerly 265k24(7)
Loss of profits due to possible price competition following merger does not constitute threat of antitrust injury necessary for injunction under Clayton Act. Clayton Act, § 16, as amended, 15 U.S.C.A. § 26.

[7] MONOPOLIES ⚿17(1.8)
265k17(1.8)
"Predatory pricing" may be defined as pricing below appropriate measure of cost for purpose of eliminating competitors in short run and reducing competition in long run.
See publication Words and Phrases for other judicial constructions and definitions.

[8] MONOPOLIES ⚿17(1.8)
265k17(1.8)
Predatory pricing is a practice inimical to purposes of the antitrust laws, and one capable of inflicting antitrust injury.

[9] MONOPOLIES ⚿24(7.1)
265k24(7.1)
Formerly 265k24(7)
Allegations of nation's fifth-largest beef packing company about results of merger of second and third largest beef packing companies were insufficient to show threat of antitrust injury as result of predatory pricing necessary to enjoin merger under Clayton Act; plaintiff failed to allege that competitor would act with predatory intent after the merger. Clayton Act, § 16, as amended, 15 U.S.C.A. § 26.

[10] MONOPOLIES ⚿28(7.5)
265k28(7.5)
Formerly 265k28(7.4)
Court should not find allegations of predatory pricing credible when alleged predator is incapable of successfully producing predatory scheme.

[11] MONOPOLIES ⚿17(1.8)
265k17(1.8)
In evaluating entry barriers in context of predatory pricing claim, court should focus on whether significant entry barriers would exist after merged firm had eliminated some of its rivals, because at that point remaining firms would begin to charge supracompetitive prices, and barriers that existed during competitive conditions might well prove insignificant.

[12] MONOPOLIES ⚿28(1.6)
265k28(1.6)
Competitors will not be denied standing to challenge acquisitions on basis of predatory pricing theories.

[13] MONOPOLIES ⚿24(7.1)
265k24(7.1)
Formerly 265k24(7)
Plaintiff seeking injunctive relief under section of Clayton Act permitting private parties threatened with loss or damage by antitrust violation to seek such relief must show threat of antitrust injury; showing of loss or damage due merely to increased competition does not constitute such injury. Clayton Act, § 16, as amended, 15 U.S.C.A. § 26.

****486 *104** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 449.

Section 16 of the Clayton Act entitles a private party to sue for injunctive relief against "threatened loss or damage by a violation of the antitrust laws." Respondent, the country's fifth-largest beef packer, brought an action in Federal District Court under § 16 to enjoin the proposed merger of petitioner Excel Corporation, the second-largest packer, and Spencer Beef, the third-largest packer. Respondent alleged that it was threatened with a loss of profits by the possibility that Excel, after the merger, would lower its prices to a level at or above its costs in an attempt to increase its market share. During trial, Excel moved for dismissal on the ground that respondent had failed to allege or show that it would suffer antitrust injury, but the District Court denied the motion. After trial, the District Court held that respondent's allegation of a "price-cost squeeze" that would severely narrow its profit margins constituted an allegation of antitrust injury. The Court of Appeals affirmed, holding that respondent's allegation of a "price-cost squeeze" was not simply one of injury from competition but was a claim of injury by a form of predatory pricing in which Excel would drive other companies out of the market.

Held:

1. A private plaintiff seeking injunctive relief under

§ 16 must show a threat of injury "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701. Pp. 488-91.

2. The proposed merger does not constitute a threat of antitrust injury. A showing, as in this case, of loss or damage due merely to increased competition does not constitute such injury. And while predatory pricing is capable of inflicting antitrust injury, here respondent neither raised nor proved any claim of predatory pricing before the District Court, and thus the Court of Appeals erred in interpreting respondent's allegations as equivalent to allegations of injury from predatory conduct. Pp. 491-94.

3. This Court, however, will not adopt in effect a per se rule denying competitors standing to challenge acquisitions on the basis of predatory-***105** pricing theories. Nothing in the Clayton Act's language or legislative history suggests that Congress intended this Court to ignore injuries caused by such anticompetitive practices as predatory pricing. P. 495.

761 F.2d 570, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and MARSHALL, POWELL, O'CONNOR, ****487** and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE, J., joined, post, ---. BLACKMUN, J., took no part in the consideration or decision of the case.

Ronald G. Carr argued the cause for petitioners. With him on the briefs were Robert F. Hanley, Alan K. Palmer, and Phillip Areeda.

Deputy Solicitor General Cohen argued the cause for the United States et al. as amici curiae urging reversal. With him on the brief were Solicitor General Fried, Assistant Attorney General Ginsburg, Deputy Assistant Attorney General Cannon, Jerrold J. Ganzfried, Catherine G. O'Sullivan, Andrea Limmer, and Marcy J.K. Tiffany.

William C. McClearn argued the cause for respondent. With him on the brief were James E. Hartley, Elizabeth A. Phelan, and Marcy G. Glenn.*

* Thomas B. Leary filed a brief for the Business Roundtable as amicus curiae urging reversal.

David L. Foster and Kim Sperduto filed a brief for Royal Crown Cola Co. as amicus curiae.

Justice BRENNAN delivered the opinion of the Court.

Under § 16 of the Clayton Act, 38 Stat. 737, as amended, 15 U.S.C. § 26, private parties "threatened [with] loss or damage by a violation of the antitrust laws" may seek injunctive relief. This case presents two questions: whether a plaintiff seeking relief under § 16 must prove a threat of antitrust injury, and, if so, whether loss or damage due to increased competition constitutes such injury.

***106 I**

Respondent Monfort of Colorado, Inc. (Monfort), the plaintiff below, owns and operates three integrated beef-packing plants, that is, plants for both the slaughter of cattle and the fabrication of beef. [FN1] Monfort operates in both the market for fed cattle (the input market) and the market for fabricated beef (the output market). These markets are highly competitive, and the profit margins of the major beef packers are low. The current markets are a product of two decades of intense competition, during which time packers with modern integrated plants have gradually displaced packers with separate slaughter and fabrication plants.

FN1. As the District Court explained, " '[f]abrication' is the process whereby the carcass is broken down into either whole cuts (referred to as 'primals', 'subprimals' and 'portions') or ground beef." 591 F.Supp. 683, 690 (D.Colo.1983). Whole cuts that are then vacuum packed before shipment are called "boxed beef"; the District Court found that "80% of all beef received at the retail supermarket level and at the hotel, restaurant, and institutional ('HRI') level" is boxed beef. Ibid.

Monfort is the country's fifth-largest beef packer. Petitioner Excel Corporation (Excel), one of the two defendants below, is the second-largest packer.

Excel operates five integrated plants and one fabrication plant. It is a wholly owned subsidiary of Cargill, Inc., the other defendant below, a large privately owned corporation with more than 150 subsidiaries in at least 35 countries.

On June 17, 1983, Excel signed an agreement to acquire the third-largest packer in the market, Spencer Beef, a division of the Land O'Lakes agricultural cooperative. Spencer Beef owned two integrated plants and one slaughtering plant. After the acquisition, Excel would still be the second-largest packer, but would command a market share almost equal to that of the largest packer, IBP, Inc. (IBP). [FN2]

FN2. The District Court relied on the testimony of one of Monfort's witnesses in determining market share. Id., at 706-707. According to this testimony, Monfort's share of the cattle slaughter market was 5.5%, Excel's share was 13.3%, and IBP's was 24.4%. 1 App. 69. Monfort's share of the production market was 5.7%, Excel's share was 14.1%, and IBP's share was 27.3%. Id., at 64. After the merger, Excel's share of each market would increase to 20.4%. Id., at 64, 69; 761 F.2d 570, 577 (CA10 1985).

***107** Monfort brought an action under § 16 of the Clayton Act, 15 U.S.C. § 26, to enjoin the prospective merger. [FN3] Its complaint ****488** alleged that the acquisition would "violat[e] Section 7 of the Clayton Act because the effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in several different ways...." 1 App. 19. Monfort described the injury that it allegedly would suffer in this way:

FN3. Section 16 states:
"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff." 15 U.S.C. § 26.

"(f) Impairment of plaintiff's ability to compete. The proposed acquisition will result in a concentration of economic power in the relevant markets which threatens Monfort's supply of fed cattle and its ability to compete in the boxed beef market." Id., at 20.

Upon agreement of the parties, the District Court consolidated the motion for a preliminary injunction with a full trial ***108** on the merits. On the second day of trial, Excel moved for involuntary dismissal on the ground, inter alia, that Monfort had failed to allege or show that it would suffer antitrust injury as defined in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). The District Court denied the motion. After the trial, the court entered a memorandum opinion and order enjoining the proposed merger. The court held that Monfort's allegation of "price-cost 'squeeze' " that would "severely narro[w]" Monfort's profit margins constituted an allegation of antitrust injury. 591 F.Supp. 683, 691-692 (Colo.1983). It also held that Monfort had shown that the proposed merger would cause this profit squeeze to occur, and that the merger violated § 7 of the Clayton Act. [FN4] Id., at 709-710.

FN4. Section 7 prohibits mergers when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly," 15 U.S.C. § 18.

On appeal, Excel argued that an allegation of lost profits due to a "price- cost squeeze" was nothing more than an allegation of losses due to vigorous competition, and that losses from competition do not constitute antitrust injury. It also argued that the District Court erred in analyzing the facts relevant to the § 7 inquiry. The Court of Appeals affirmed the judgment in all respects. It held that Monfort's allegation of a "price-cost squeeze" was not simply an allegation of injury from competition; in its view, the alleged "price-cost squeeze" was a claim that Monfort would be injured by what the Court of Appeals "consider[ed] to be a form of predatory pricing in which Excel will drive other companies out of the market by paying more to its cattle suppliers and charging less for boxed beef that it sells to institutional buyers and consumers." 761 F.2d 570, 575 (CA10 1985). On the § 7 issue, the Court of Appeals held that the District Court's decision was not clearly erroneous. We granted certiorari, 474 U.S. 1049, 106 S.Ct. 784, 88 L.Ed.2d 763 (1985).

***109 II**

This case requires us to decide, at the outset, a question we have not previously addressed: whether a private plaintiff seeking an injunction under § 16 of the Clayton Act must show a threat of antitrust injury. To decide the question, we must look first to the source of the antitrust injury requirement, which lies in a related provision of the Clayton Act, § 4, 15 U.S.C. § 15.

Like § 16, § 4 provides a vehicle for private enforcement of the antitrust laws. Under § 4, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States ..., and shall recover threefold the damages by him sustained, ****489** and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. In Brunswick Corp. v. Pueblo Bowl-O- Mat, Inc., supra, we held that plaintiffs seeking treble damages under § 4 must show more than simply an "injury causally linked" to a particular merger; instead, "plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Id., 429 U.S., at 489, 97 S.Ct., at 697 (emphasis in original). The plaintiffs in Brunswick did not prove such injury. The plaintiffs were 3 of the 10 bowling centers owned by a relatively small bowling chain. The defendant, one of the two largest bowling chains in the country, acquired several bowling centers located in the plaintiffs' market that would have gone out of business but for the acquisition. The plaintiffs sought treble damages under § 4, alleging as injury "the loss of income that would have accrued had the acquired centers gone bankrupt" and had competition in their markets consequently been reduced. Id., at 487, 97 S.Ct., at 696. We held that this injury, although causally related to a merger alleged to violate § 7, was not an antitrust injury, since "[i]t is inimical to [the antitrust] laws to award damages" for losses stemming ***110** from continued competition. Id., at 488, 97 S.Ct., at 697. This reasoning in Brunswick was consistent with the principle that "the antitrust laws ... were enacted for 'the protection of competition, not competitors.' " Ibid., quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962) (emphasis in original).

[1] Subsequent decisions confirmed the importance of showing antitrust injury under § 4. In Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), we found that a health-plan subscriber suffered antitrust injury as a result of the plan's "purposefully anticompetitive scheme " to reduce competition for psychotherapeutic services by reimbursing subscribers for services provided by psychiatrists but not for services provided by psychologists. Id., at 483, 102 S.Ct., at 2550. We noted that antitrust injury, "as analyzed in Brunswick, is one factor to be considered in determining the redressability of a particular form of injury under § 4," id., at 483, n. 19, 102 S.Ct., at 2550, n. 19, and found it "plain that McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." Id., at 483, 102 S.Ct., at 2550. Similarly, in Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), we applied "the Brunswick test," and found that the petitioner had failed to allege antitrust injury. Id., at 539-540, 103 S.Ct., at 909. [FN5]

FN5. A showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4, because a party may have suffered antitrust injury but may not be a proper plaintiff under § 4 for other reasons. See generally Page, The Scope of Liability for Antitrust Violations, 37 Stan.L.Rev. 1445, 1483-1485 (1985) (distinguishing concepts of antitrust injury and antitrust standing). Thus, in Associated General Contractors we considered other factors in addition to antitrust injury to determine whether the petitioner was a proper plaintiff under § 4. 459

U.S., at 540, 103 S.Ct., at 909. As we explain, n. 6, infra, however, many of these other factors are not relevant to the standing inquiry under § 16.

[2][3][4] Section 16 of the Clayton Act provides in part that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief ... against threatened loss ***111** or damage by a violation of the antitrust laws...." 15 U.S.C. § 26. It is plain that § 16 and § 4 do differ in various ways. For example, § 4 requires a plaintiff to show actual injury, but § 16 requires a showing only of "threatened" loss or damage; similarly, § 4 requires a showing of injury to "business or property," cf. Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972), while § 16 contains no ****490** such limitation. [FN6] Although these differences do affect the nature of the injury cognizable under each section, the lower courts, including the courts below, have found that under both § 16 and § 4 the plaintiff must still allege an injury of the type the antitrust laws were designed to prevent. [FN7] We agree.

FN6. Standing analysis under § 16 will not always be identical to standing analysis under § 4. For example, the difference in the remedy each section provides means that certain considerations relevant to a determination of standing under § 4 are not relevant under § 16. The treble-damages remedy, if afforded to "every person tangentially affected by an antitrust violation," Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-477, 102 S.Ct. 2540, 2546-2547, 73 L.Ed.2d 149 (1982), or for "all injuries that might conceivably be traced to an antitrust violation," Hawaii v. Standard Oil Co., 405 U.S., at 263, n. 14, 92 S.Ct., at 891, n. 14, would "open the door to duplicative recoveries," id., at 264, 92 S.Ct., at 892, and to multiple lawsuits. In order to protect against multiple lawsuits and duplicative recoveries, courts should examine other factors in addition to antitrust injury, such as the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed, to determine whether a party is a proper plaintiff under § 4. See Associated General Contractors, 459 U.S., at 544-545, 103 S.Ct., at 911-912; Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). Conversely, under § 16, the only remedy available is equitable in nature, and, as we recognized in Hawaii v. Standard Oil Co., "the fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one." 405 U.S., at 261, 92 S.Ct., at 890. Thus, because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16.

FN7. See Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1334 (CA7 1986); Midwest Communications, Inc. v. Minnesota Twins, Inc., 779 F.2d 444, 452-453 (CA8 1985), cert. denied, 476 U.S. 1163, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986); Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1358 (CA6), cert. dism'd, 469 U.S. 1200, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210-211 (CA3 1980).

***112** The wording concerning the relationship of the injury to the violation of the antitrust laws in each section is comparable. Section 4 requires proof of injury "by reason of anything forbidden in the antitrust laws"; § 16 requires proof of "threatened loss or damage by a violation of the antitrust laws." It would be anomalous, we think, to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred.

There is no indication that Congress intended such a result. Indeed, the legislative history of § 16 is consistent with the view that § 16 affords private plaintiffs injunctive relief only for those injuries cognizable under § 4. According to the House Report:

> "Under section 7 of the act of July 2, 1890 [revised and incorporated into Clayton Act as § 4], a person injured in his business and property by corporations or combinations acting in violation of the Sherman antitrust law, may recover loss and damage for such wrongful act. There is, however, no provision in the existing law authorizing a person, firm, corporation, or association to enjoin threatened loss or damage to his business or property by the commission of such unlawful acts, and the purpose of this section is to remedy such defect in the law." H.R.Rep. No. 627, 63d Cong., 2d Sess., pt. 1, p. 21 (1914) (emphasis added). [FN8]

FN8. See also S.Rep. No. 698, 63d Cong., 2d Sess., pt. 2, pp. 17-18, 50 (1914). Although the references to § 16 in the debates on the passage of the Clayton Act are scarce, those that were made are consistent with the House and Senate Reports. For example, in this excerpt from a provision- by-provision description of the bill, Representative McGillicuddy (a member of the House Judiciary Committee) stated:

"Under the present law any person injured in his business or property by acts in violation of the Sherman antitrust law may recover his damage. In fact, under the provisions of the law he is entitled to recover threefold damage whenever he is able to prove his case. There is no provision under the present law, however, to prevent threatened loss or damage even though it be irreparable. The practical effect of this is that a man would have to sit by and see his business ruined before he could take advantage of his remedy. In what condition is such a man to take up a long and costly lawsuit to defend his rights?

"The proposed bill solves this problem for the person, firm, or corporation threatened with loss or damage to property by providing injunctive relief against the threatened act that will cause such loss or damage. Under this most excellent provision a man does not have to wait until he is ruined in his business before he has his remedy. Thus the bill not only protects the individual from loss or damage, but it relieves him of the tremendous burden of long and expensive litigation, often intolerable." 51 Cong.Rec. 9261 (1914) (emphasis added). Representative Floyd described the nature of the § 16 remedy in these terms:

"In section 16 ... is a provision that gives the litigant injured in his business an entirely new remedy....

* * *

"... [S]ection 16 gives any individual, company, or corporation ... or combination the right to go into court and enjoin the doing of these unlawful acts, instead of having to wait until the act is done and the business destroyed and then sue for damages.... [S]o that if a man is injured by a discriminatory contract, by a tying contract, by the unlawful acquisition of stock of competing corporations, or by reason of someone acting unlawfully as a director in two banks or other corporations, he can go into court and enjoin and restrain the party from committing such unlawful acts." Id., at 16319.

***113 **491** Sections 4 and 16 are thus best understood as providing complementary remedies for a single set of injuries. Accordingly, we conclude that in order to seek injunctive relief under § 16, a private plaintiff must allege threatened loss or damage "of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful." Brunswick, 429 U.S., at 489, 97 S.Ct., at 697. We therefore turn to the question whether the proposed merger in this case threatened respondent with antitrust injury.

III

Initially, we confront the problem of determining what Monfort alleged the source of its injury to be. Monfort's complaint is of little assistance in this regard, since the injury ***114** alleged therein--"an impairment of plaintiff's ability to compete"--is alleged to result from "a concentration of economic power." 1 App. 19. The pretrial order largely restates these general allegations. Record 37. At trial, however, Monfort did present testimony and other evidence that helped define the threatened loss. Monfort alleged that after the merger, Excel would attempt to increase its market share at the expense of smaller rivals, such as Monfort. To that end, Monfort claimed, Excel would bid up the price it would pay for cattle, and reduce the price at which it sold boxed beef. Although such a strategy, which Monfort labeled a "price-cost squeeze," would reduce Excel's profits, Excel's parent corporation had the financial reserves to enable Excel to pursue such a strategy. Eventually, according to Monfort, smaller competitors lacking significant reserves and unable to match Excel's prices would be driven from the market; at this point Excel would raise the price of its boxed beef to supracompetitive levels, and would more than recoup the profits it lost during the initial phase. 591 F.Supp., at 691-692.

From this scenario two theories of injury to Monfort emerge: (1) a threat of a loss of profits stemming from the possibility that Excel, after the merger, would lower its prices to a level at or only slightly above its costs; (2) a threat of being driven out of business by the possibility that Excel, after the merger, would lower its prices to a level below its costs. [FN9] We discuss each theory in turn.

FN9. In its brief, Monfort also argues that it would be injured by "the trend toward oligopoly pricing" that could conceivably follow the merger. Brief for Respondent 18-20. There is no indication in the record that this claim was raised below, however, and so we do not address it here.

A

[5] Monfort's first claim is that after the merger, Excel would lower its prices to some level at or slightly above its costs in order to compete with other packers for market share. ***115** Excel would be in a position to do this because of the multiplant ****492** efficiencies its acquisition of Spencer would provide, 1 App. 74-75, 369-370. To remain competitive, Monfort would have to lower its prices; as a result, Monfort would suffer a loss in profitability, but would not be driven out of business. [FN10] The question is whether Monfort's loss of profits in such circumstances constitutes antitrust injury.

FN10. In this case, Monfort has conceded that its viability would not be threatened by Excel's decision to lower prices: "Because Monfort's operations were as efficient as those of Excel, only below-cost pricing could remove Monfort as an obstacle." Id., at 11-12; see also id., at 5, and n. 6 ("Monfort proved it was just as efficient as Excel"); id., at 18; 761 F.2d, at 576 ("Monfort would only be harmed by sustained predatory pricing").

[6] To resolve the question, we look again to Brunswick v. Pueblo Bowl-O- Mat, supra. In Brunswick, we evaluated the antitrust significance of several competitors' loss of profits resulting from the entry of a large firm into its market. We concluded:

"[T]he antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for 'the protection of competition, not competitors,' Brown Shoe Co. v. United States, 370 U.S., at 320, 82 S.Ct., at 1521. It is inimical to the purposes of these laws to award damages for the type of injury claimed here." Id., at 488, 97 S.Ct., at 697.

The loss of profits to the competitors in Brunswick was not of concern under the antitrust laws, since it resulted only from continued competition. Respondent argues that the losses in Brunswick can be distinguished from the losses alleged here, since the latter will result from an increase, rather than from a mere continuation, of competition. The range of actions***116** unlawful under § 7 of the Clayton Act is broad enough, respondent claims, to support a finding of antitrust injury whenever a competitor is faced with a threat of losses from increased competition. [FN11] We find respondent's proposed construction of § 7 too broad, for reasons that Brunswick illustrates. Brunswick holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (CA6), cert. denied, 469 U.S. 1036, 105 S.Ct. 510, 83 L.Ed.2d 401****493** (1984). The logic of ***117** Brunswick compels the conclusion that the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.

FN11. Respondent finds support in the legislative history of the Hart- Scott-Rodino Antitrust Improvements Act of 1976 for the view that Congress intends the courts to apply § 7 so as to protect the viability of small competitors. The Senate Report, for example, cites with approval this Court's statement in United States v. Von's Grocery Co., 384 U.S. 270, 275, 86 S.Ct. 1478, 1480, 16 L.Ed.2d 555 (1966), that "the basic purpose of the 1950 Celler-Kefauver Act [amending § 7 of the Clayton Act] was to prevent economic concentration in the American economy by keeping a large number of small competitors in business." S.Rep. No. 94-803, p. 63 (1976). Even if respondent is correct that Congress intended the courts to apply § 7 so as to keep small competitors in business at the expense of efficiency, a proposition about which there is considerable disagreement, such congressional intent is of no use to Monfort, which has conceded that it will suffer only a loss of profits, and not be driven from the market, should Excel engage in a cost-price squeeze. See n. 10, supra.

B

[7][8] The second theory of injury argued here is that after the merger Excel would attempt to drive Monfort out of business by engaging in sustained predatory pricing. Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run. [FN12] It is a practice ***118** that harms both competitors and competition. In contrast to price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimination of competition. Predatory pricing is thus a practice "inimical to the purposes of [the antitrust] laws," Brunswick, 429 U.S., at 488, 97 S.Ct., at 697, and one capable of inflicting antitrust injury. [FN13]

FN12. Most commentators reserve the term predatory pricing for pricing below some measure of cost, although they differ on the appropriate measure. See, e.g., Areeda & Turner, Predatory Pricing and Related Practices under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697 (1975); McGee, Predatory Pricing Revisited, 23 J.Law & Econ. 289 (1980) (reviewing various proposed definitions). No consensus has yet been reached on the proper definition of predatory pricing in the antitrust context, however. For purposes of decision in Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), for example, we defined predatory pricing as either "(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." Id., at 585, n. 8, 106 S.Ct., at 1355, n. 8. Definitions of predatory pricing also vary among the Circuits. Compare Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1056-1057 (CA6) (pricing below marginal or average variable cost presumptively illegal, pricing above such cost presumptively legal), cert. denied, 469 U.S. 1036, 105 S.Ct. 510, 511, 83 L.Ed.2d 401 (1984), with Transamerica Computer Co. v. International Business Machines Corp., 698 F.2d 1377 (CA9) (pricing above average total costs may be deemed predatory upon showing of predatory intent), cert. denied, 464 U.S. 955, 104 S.Ct. 370, 78 L.Ed.2d 329 (1983).

Although neither the District Court nor the Court of Appeals explicitly defined the term predatory pricing, their use of the term is consistent with a definition of pricing below cost. Such a definition is sufficient for purposes of this decision, because only below-cost pricing would threaten to drive Monfort from the market, see n. 9, supra, and because Monfort made no allegation that Excel would act with predatory intent. Thus, in this case, as in Matsushita Electric Industrial Co. v. Zenith Radio Corp., supra, we find it unnecessary to "consider whether recovery should ever be available ... when the pricing in question is above some measure of incremental cost," 475 U.S., at 585, n. 9, 106 S.Ct., at 1355, n. 9, or whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation. See n. 11, supra.

FN13. See also Brunswick, 429 U.S., at 489, n. 14, 97 S.Ct., at 698, n. 14 ("The short-term effect of certain anticompetitive behavior--predatory below-cost pricing, for example--may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened").

[9] The Court of Appeals held that Monfort had alleged "what we consider to be a form of predatory pricing...." 761 F.2d, at 575. The court also found that Monfort "could only be harmed by sustained predatory pricing," and that "it is impossible to tell in advance of the acquisition" whether Excel would in fact engage in such a course of conduct; because it could not rule out the possibility that Excel would engage in predatory pricing, it found that Monfort was threatened with antitrust injury. Id., at 576.

[10][11] Although the Court of Appeals did not explicitly define what it meant by predatory pricing, two interpretations are plausible. First, the court can be understood to mean that Monfort's allegation of losses from the above-cost "price-cost squeeze" was equivalent to an allegation of injury from predatory conduct. If this is the proper interpretation, then the court's judgment is clearly erroneous because (a) Monfort made no allegation that Excel would act with predatory intent after the merger, and (b) price competition is not predatory activity, for the reasons discussed in Part III-A, supra.

****494** Second, the Court of Appeals can be understood to mean that Monfort had shown a credible threat of injury from below-cost pricing. To the extent the judgment rests on this ground, however, it must also be reversed, because Monfort

*119 did not allege injury from below-cost pricing before the District Court. The District Court twice noted that Monfort had made no assertion that Excel would engage in predatory pricing. See 591 F.Supp., at 691 ("Plaintiff does not contend that predatory practices would be engaged in by Excel or IBP"); id., at 710 ("Monfort does not allege that IBP and Excel will in fact engage in predatory activities as part of the cost-price squeeze"). [FN14] Monfort argues that there is evidence in the record to support its view that it did raise a claim of predatory pricing below. This evidence, however, consists only of four passing references, three in deposition testimony, to the possibility that Excel's prices might dip below costs. See 1 App. 276; 2 App. 626, 666, 669. Such references fall far short of establishing an allegation of injury from predatory pricing. We conclude that Monfort neither raised nor proved any claim of predatory pricing before the District Court. [FN15]

FN14. The Court of Appeals may have relied on the District Court's speculation that the merger raised "a distinct possibility ... of predatory pricing." 591 F.Supp., at 710. This statement directly followed the District Court's second observation that Monfort did not raise such a claim, however, and thus was clearly dicta.

FN15. Even had Monfort actually advanced a claim of predatory pricing, we doubt whether the facts as found by the District Court would have supported it. Although Excel may have had the financial resources to absorb losses over an extended period, other factors, such as Excel's share of market capacity and the barriers to entry after competitors have been driven from the market, must also be considered.

In order to succeed in a sustained campaign of predatory pricing, a predator must be able to absorb the market shares of its rivals once prices have been cut. If it cannot do so, its attempt at predation will presumably fail, because there will remain in the market sufficient demand for the competitors' goods at a higher price, and the competitors will not be driven out of business. In this case, Excel's 20.4% market share after the merger suggests it would lack sufficient market power to engage in predatory pricing. See Williamson, Predatory Pricing: A Strategic and Welfare Analysis, 87 Yale L.J. 284, 292 (1977) (60% share necessary); Areeda & Turner, Williamson on Predatory Pricing, 87 Yale L.J. 1337, 1348 (1978) (60% share not enough). It is possible that a firm with a low market share might nevertheless have sufficient excess capacity to enable it rapidly to expand its output and absorb the market shares of its rivals. According to Monfort's expert witness, however, Excel's postmerger share of market capacity would be only 28.4%. 1 App. 66. Moreover, it appears that Excel, like the other large beef packers, operates at over 85% of capacity. Id., at 135-136. Thus Excel acting alone would clearly lack sufficient capacity after the merger to satisfy all or most of the demand for boxed beef. Although it is conceivable that Excel could act collusively with other large packers, such as IBP, in order to make the scheme work, the District Court found that Monfort did not "assert that Excel and IBP would act in collusion with each other in an effort to drive others out of the market," 591 F.Supp., at 692. With only a 28.4% share of market capacity and lacking a plan to collude, Excel would harm only itself by embarking on a sustained campaign of predatory pricing. Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme. See n. 17, infra.

It is also important to examine the barriers to entry into the market, because "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time." Matsushita, 475 U.S., at 591, n. 15, 106 S.Ct., at 1358, n. 15. In discussing the potential for oligopoly pricing in the beef-packing business following the merger, the District Court found significant barriers to entry due to the "costs and delays" of building new plants, and "the lack of [available] facilities and the cost [$20-40 million] associated with refurbishing old facilities." 591 F.Supp., at 707-708. Although the District Court concluded that these barriers would restrict entry following the merger, the court's analysis was premised on market conditions during the premerger period of competitive pricing. Ibid. In evaluating entry barriers in the context of a predatory pricing claim, however, a court should focus on whether significant entry barriers would exist after the merged firm had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during competitive conditions might well prove insignificant. In this case, for example, although costs of entry into the current competitive market may be high, if Excel and others in fact succeeded in driving competitors out of the market, the facilities of the bankrupt competitors would then be available, and the record shows, without apparent contradiction, that shut-down plants could be producing efficiently in a manner of months and that equipment and a labor force could readily be obtained. 1 App. 95-96.

Similarly, although the District Court determined that the high costs of building new plants and refurbishing old plants created a "formidable" barrier to entry given "the low profit margins in the beef industry," 591 F.Supp., at 707, this finding speaks neither to the likelihood of entry during a period of supracompetitive profitability nor to the potential return on investment in such a period.

***120 **495** IV

[12] In its amicus brief, the United States argues that the "danger of allowing a competitor to challenge an acquisition ***121** on the basis of necessarily speculative claims of post-acquisition predatory pricing far outweighs the danger that any anticompetitive merger will go unchallenged." Brief for United States as Amicus Curiae 25. On this basis, the United States invites the Court to adopt in effect a per se rule "denying competitors standing to challenge acquisitions on the basis of predatory pricing theories." Id., at 10.

We decline the invitation. As the foregoing discussion makes plain, supra, at ----, predatory pricing is an anticompetitive practice forbidden by the antitrust laws. While firms may engage in the practice only infrequently, there is ample evidence suggesting that the practice does occur. [FN16] It would be novel indeed for a court to deny standing to a party seeking an injunction against threatened injury merely because such injuries rarely occur. [FN17] In any case, nothing in ***122** the language or legislative history of the Clayton Act suggests that Congress intended this Court to ignore injuries caused by such anticompetitive practices as predatory pricing.

FN16. See Koller, The Myth of Predatory Pricing: An Empirical Study, 4 Antitrust Law & Econ.Rev. 105 (1971); Miller, Comments on Baumol and Ordover, 28 J.Law & Econ. 267 (1985).

FN17. Claims of threatened injury from predatory pricing must, of course, be evaluated with care. As we discussed in Matsushita Electric Industrial Co. v. Zenith Radio Corp., the likelihood that predatory pricing will benefit the predator is "inherently uncertain: the short-run loss [from pricing below cost] is definite, but the long-run gain depends on successfully neutralizing the competition.... [and] on maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." 475 U.S., at 589, 106 S.Ct., at 1357. Although the commentators disagree as to whether it is ever rational for a firm to engage in such conduct, it is plain that the obstacles to the successful execution of a strategy of predation are manifold, and that the disincentives to engage in such a strategy are accordingly numerous. See, e.g., id., at 588-593, 106 S.Ct. at 1357-1359 (discussing obstacles to successful predatory pricing conspiracy); R. Bork, The Antitrust Paradox 144-159 (1978); McGee, Predatory Pricing Revisited, 23 J. Law & Econ., at 291-300; Posner, The Chicago School of Antitrust Analysis, 127 U.Pa.L.Rev. 925, 939-940 (1979). As we stated in Matsushita, "predatory pricing schemes are rarely tried, and even more rarely successful." 475 U.S., at 587, 106 S.Ct., at 1356. Moreover, the mechanism by which a firm engages in predatory pricing--lowering prices--is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition ...[;] mistaken inferences ... are especially costly, because they chill the very conduct the antitrust laws are designed to protect." Id., at 594, 106 S.Ct., at 1360.

V

[13] We hold that a plaintiff seeking injunctive relief under § 16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury. The record below does not support a finding of antitrust injury, but only of threatened loss from increased competition. Because respondent has therefore failed to make the showing § 16 requires, we need not reach the question whether the proposed merger violates § 7. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice BLACKMUN took no part in the consideration or decision of this case.

Justice STEVENS, with whom Justice WHITE joins, dissenting.

This case presents the question whether the antitrust laws provide a remedy for a ****496** private party that challenges a horizontal merger between two of its largest competitors. The issue may be approached along two fundamentally different paths. First, the Court might focus its attention entirely on the postmerger conduct of the merging firms and deny relief *123 unless the plaintiff can prove a violation of the Sherman Act. Second, the Court might concentrate on the merger itself and grant relief if there is a significant probability that the merger will adversely affect competition in the market in which the plaintiff must compete. Today the Court takes a step down the former path; [FN1] I believe that Congress has directed us to follow the latter path.

FN1. Whether or not it so intends, the Court in practical effect concludes that a private party may not obtain injunctive relief against a horizontal merger unless the actual or probable conduct of the merged firms would establish a violation of the Sherman Act. The Court suggests that, to support a claim of predatory pricing, a competitor must demonstrate that the merged entity is "able to absorb the market shares of its rivals once prices have been cut," either because it has a high market share or because it has "sufficient excess capacity to enable it rapidly to expand its output and absorb the market shares of its rivals." Ante, at 494, n. 15. The Court would also require a competitor to demonstrate that significant barriers to entry would exist after "the merged firm had eliminated some of its rivals...." Ante, at 494, n. 15. Indeed, the Court expressly states that the antitrust laws "require the courts to protect small businesses ... only against the loss of profits from practices forbidden by the antitrust laws." Ante, at 12 (emphasis added). By emphasizing postmerger conduct, the Court reduces to virtual irrelevance the related but distinct issue of the legality of the merger itself.

In this case, one of the major firms in the beef-packing market has proved to the satisfaction of the District Court, 591 F.Supp. 683, 709-710 (Colo.1983), and the Court of Appeals, 761 F.2d 570, 578-582 (CA10 1985), that the merger between Excel and Spencer Beef is illegal. This Court holds, however, that the merger should not be set aside because the adverse impact of the merger on respondent's profit margins does not constitute the kind of "antitrust injury" that the Court described in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). As I shall demonstrate, Brunswick merely rejected a "novel damages theory," id., at 490, 97 S.Ct., at 698; the Court's implicit determination that Brunswick forecloses the appropriate line of inquiry in this quite different case is therefore misguided. In my view, a *124 competitor in Monfort's position has standing to seek an injunction against the merger. Because Monfort must compete in the relevant market, proof establishing that the merger will have a sufficient probability of an adverse effect on competition to violate § 7 is also sufficient to authorize equitable relief.

I

Section 7 of the Clayton Act was enacted in 1914, 38 Stat. 731, and expanded in 1950, 64 Stat. 1125, because Congress concluded that the Sherman Act's prohibition against mergers was not adequate. [FN2] The Clayton Act, unlike the Sherman Act, proscribes certain combinations of competitors that do not produce any actual injury, either to competitors or to competition. An acquisition is prohibited by § 7 if "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. The legislative history teaches us that this delphic language was designed "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding." S.Rep. No. 1775, 81st Cong., 2d Sess., 4-5 (1950), U.S.Code Cong.Service 1950, p. 4293, 4296. [FN3] In Brunswick, *125 **497 supra, this Court recognized that § 7 is "a prophylactic measure, intended 'primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil....' " 429 U.S., at 485, 97 S.Ct., at 695 (quoting United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 597, 77 S.Ct. 872, 879, 1 L.Ed.2d 1057 (1957)).

FN2. "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 [the Sherman Act], or other existing antitrust acts, and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation." S.Rep. No. 698, 63d Cong., 2d Sess., 1 (1914).

FN3. This Court has described the legislative purpose of § 7 as follows:
"[I]t is apparent that a keystone in the erection of a

barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum." Brown Shoe Co. v. United States, 370 U.S. 294, 317- 318, 82 S.Ct. 1502, 1519-20, 8 L.Ed.2d 510 (1962) (footnote omitted).

The 1950 amendment to § 7 was particularly concerned with the problem created by a merger which, when viewed by itself, would appear completely harmless, but when considered in its historical setting might be dangerous to competition. As Justice Stewart explained: "The principal danger against which the 1950 amendment was addressed was the erosion of competition through the cumulative centripetal effect of acquisitions by large corporations, none of which by itself might be sufficient to constitute a violation of the Sherman Act. Congress' immediate fear was that of large corporations buying out small companies. A major aspect of that fear was the perceived trend toward absentee ownership of local business. Another, more generalized, congressional purpose revealed by the legislative history was to protect small businessmen and to stem the rising tide of concentration in the economy. These goals, Congress thought, could be achieved by 'arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency.' Brown Shoe Co. v. United States, [370 U.S.,] at 317, 82 S.Ct., at 1519." United States v. Von's Grocery Co., 384 U.S. 270, 283-284, 86 S.Ct. 1478, 1485-1486, 16 L.Ed.2d 555 (1966) (dissenting).

Thus, a merger may violate § 7 of the Clayton Act merely because it poses a serious threat to competition and even though the evidence falls short of proving the kind of actual restraint that violates the Sherman Act, 15 U.S.C. § 1. The language of § 16 of the Clayton Act also reflects Congress' emphasis on probable harm rather than actual harm. Section 16 authorizes private parties to obtain injunctive relief "*126 against threatened loss or damage" by a violation of § 7. [FN4] The broad scope of the language in both § 7 and § 16 identifies the appropriate standing requirements for injunctive relief. As the Court has squarely held, it is the threat of harm, not actual injury, that justifies equitable relief:

FN4. Section § 16 states, in relevant part:
"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue...." 15 U.S.C. § 26.

"The evident premise for striking [the injunction at issue] was that Zenith's failure to prove the fact of injury barred injunctive relief as well as treble damages. This was unsound, for § 16 of the Clayton Act, 15 U.S.C. § 26, which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of 'threatened' injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury; ... he need only demonstrate a significant threat of injury from an impending **498 violation of the antitrust laws or from a contemporary violation likely to continue or recur." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969) (citations omitted).

Judged by these standards, respondent's showing that it faced the threat of loss from an impending antitrust violation clearly conferred standing to obtain injunctive relief. Respondent *127 alleged, and in the opinion of the courts below proved, the injuries it would suffer from a violation of § 7:

"Competition in the markets for the procurement of fed cattle and the sale of boxed beef will be substantially lessened and a monopoly may tend to be created in violation of Section 7 of the Clayton Act;

"Concentration in those lines of commerce will be increased and the tendency towards concentration will be accelerated." 1 App. 21.

More generally, given the statutory purposes to protect small businesses and to stem the rising tide of concentration in particular markets, a competitor trying to stay in business in a changing market must have standing to ask a court to set aside a merger that has changed the character of the market in an illegal way. Certainly the businesses--small or large--that must face competition in a market altered by an illegal merger are directly affected by that transaction. Their inability to prove exactly how or why they may be harmed does not place them outside the circle of interested parties whom the statute was enacted to protect.

II

Virtually ignoring the language and history of § 7 of the Clayton Act and the broad scope of the Act's provision for injunctive relief, the Court bases its decision entirely on a case construing the "private damages action provisions" of the Act. Brunswick, 429 U.S., at 478, 97 S.Ct., at 692. In Brunswick, we began our analysis by acknowledging the difficulty of meshing § 7, "a statutory prohibition against acts that have a potential to cause certain harms," with § 4, a "damages action intended to remedy those harms." Id., at 486, 97 S.Ct., at 696. We concluded that a plaintiff must prove more than a violation of § 7 to recover damages, "since such proof establishes only that injury may result." Ibid. Beyond the special nature of an action for treble damages, § 16 differs from § 4 because by its terms it requires only that the antitrust violation threaten *128 the plaintiff with loss or damage, not that the violation cause the plaintiff actual "injur[y] in his business or property." 15 U.S.C. § 15.

In the Brunswick case, the Court set aside a damages award that was based on the estimated additional profits that the plaintiff would have earned if competing bowling alleys had gone out of business instead of being acquired by the defendant. We concluded "that the loss of windfall profits that would have accrued had the acquired centers failed" was not the kind of actual injury for which damages could be recovered under § 4. 429 U.S., at 488, 97 S.Ct., at 697. That injury "did not occur 'by reason of' that which made the acquisitions unlawful." Ibid.

In contrast, in this case it is the threatened harm--to both competition and to the competitors in the relevant market--that makes the acquisition unlawful under § 7. The Court's construction of the language of § 4 in Brunswick is plainly not controlling in this case. [FN5] The concept of "antitrust injury," which is at the heart of the **499 treble-damages action, is simply not an element of a cause of action for injunctive relief that depends on finding a reasonable threat that an incipient disease will poison an entire market.

FN5. In Brunswick, we reserved this question, stating: "The issue for decision is a narrow one.... Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares." 429 U.S., at 484, 97 S.Ct., at 695, (footnote omitted). Nor did we reach the issue of a competitor's standing to seek relief from a merger under § 16 in Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). Id., at 524, n. 5, 103 S.Ct., at 901, n. 5.

A competitor plaintiff who has proved a violation of § 7, as the Brunswick Court recognized, has established that injury may result. This showing satisfies the language of § 16 provided that the plaintiff can show that injury may result to him. When the proof discloses a reasonable probability that competition will be harmed as a result of a merger, I would also conclude that there is a reasonable probability that *129 a competitor of the merging firms will suffer some corresponding harm in due course. In my opinion, that reasonable probability gives the competitor an interest in the proceeding adequate to confer standing to challenge the merger. To hold otherwise is to frustrate § 7 and to read § 16 far too restrictively.

It would be a strange antitrust statute indeed which defined a violation enforceable by no private party. Effective enforcement of the antitrust laws has always depended largely on the work of private attorney generals, for whom Congress made special provision in the Clayton Act itself. [FN6] As recently as 1976, Congress specifically indicated its intent to encourage private enforcement of § 16 by authorizing recovery of a reasonable attorney's fee by a plaintiff in an action for injunctive relief. The Hart-Scott-Rodino Antitrust Improvements Act of

1976, 90 Stat. 1396 (amending 15 U.S.C. § 26).

FN6. 15 U.S.C. § 15. This Court has emphasized the importance of the statutory award of fees to private antitrust plaintiffs as part of the effective enforcement of the antitrust laws. In Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-131, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969), the Court observed:
"[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."
See also Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139, 88 S.Ct. 1981, 1984, 20 L.Ed.2d 982 (1968); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502, 89 S.Ct. 1252, 1258, 22 L.Ed.2d 495 (1969); Hawaii v. Standard Oil Co., 405 U.S. 251, 262, 92 S.Ct. 885, 891, 31 L.Ed.2d 184 (1972).

The Court misunderstands the message that Congress conveyed in 1914 and emphasized in 1950. If, as the District Court and the Court of Appeals held, the merger is illegal, it should be set aside. I respectfully dissent.

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C

ARTHUR S. LANGENDERFER, INC., et al., Plaintiffs-Appellees, Cross-Appellants, MacRitchie Materials, Inc., Proposed-Intervenor-Appellant, (81-3115),
v.
S.E. JOHNSON COMPANY, et al., Defendants-Appellants, Cross-Appellees.

Nos. 80-3705, 81-3065, 81-3114 and 81-3115.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 29, 1982.

Decided March 15, 1984.

In antitrust action, the United States District Court for the Northern District of Ohio, Don J. Young, J., entered judgment upon jury verdict for plaintiffs, enjoined future acquisitions and anticompetitive acts and refused to allow posttrial intervention by company affiliated with plaintiff, and appeals and cross-appeals were taken. The Court of Appeals, Wellford, Circuit Judge, held that: (1) Sherman Act liability could not be premised on alleged predatory pricing without some evidence that defendant had charged prices below its total cost for product sold; (2) issue of whether plaintiff's injuries resulted from anticompetitive acts made possible by defendant's acquisitions was properly a jury question; (3) with exception of one acquisition, there was no evidence that any company acquired by defendant in asphalt hot-mix business was directly engaged in interstate commerce, as required by section seven of Clayton Act at time of trial; (4) section 16 of Clayton Act does not create private divestiture remedy; and (5) trial court did not abuse its discretion in denying posttrial motion for permissive intervention in injunctive relief hearings sought by sister company of plaintiff which competed in different product market.

Vacated and remanded.

Wilhoit, District Judge, sitting by designation, filed a dissenting opinion.

[1] MONOPOLIES ⚷12(1.3)
265k12(1.3)
In order to recover under section two of Sherman Act, whether for monopolization or attempt to monopolize, plaintiff had to establish that defendant engaged in some type of prohibited anticompetitive conduct. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[2] MONOPOLIES ⚷12(1.3)
265k12(1.3)
To establish monopolization under section two of Sherman Act, plaintiff had to prove that defendant unfairly attained or maintained "monopoly power," that is, the power to control prices or exclude competition. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.
See publication Words and Phrases for other judicial constructions and definitions.

[3] MONOPOLIES ⚷12(1.3)
265k12(1.3)
To establish that defendant attempted to monopolize, plaintiff had to prove that defendant engaged in anticompetitive conduct with specific intent to monopolize and that attempt had dangerous probability of success. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[4] MONOPOLIES ⚷28(8)
265k28(8)
Even if evidence had been sufficient to avoid directed verdict on predatory pricing claim, trial court's failure to instruct jury on legal standard for predatory pricing was erroneous. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[5] MONOPOLIES ⚷28(8)
265k28(8)
Choice of cost-based standard for evaluating claims of predatory pricing is question of law to be decided by trial judge. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[6] MONOPOLIES ⚷17(1.8)
265k17(1.8)
To establish predatory pricing, plaintiff must prove that anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance firm's long-term ability to reap benefits of monopoly power; if defendant's prices were below average total cost but

above average variable cost, plaintiff bears burden of showing defendant's pricing was predatory; if, however, plaintiff proves that defendant's prices were below average variable cost, plaintiff has established prima facie case of predatory pricing and burden shifts to defendant to prove that prices were justified without regard to any anticipated destructive effect they might have on competitors. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[6] MONOPOLIES ⚷28(7.1)
265k28(7.1)
To establish predatory pricing, plaintiff must prove that anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance firm's long-term ability to reap benefits of monopoly power; if defendant's prices were below average total cost but above average variable cost, plaintiff bears burden of showing defendant's pricing was predatory; if, however, plaintiff proves that defendant's prices were below average variable cost, plaintiff has established prima facie case of predatory pricing and burden shifts to defendant to prove that prices were justified without regard to any anticipated destructive effect they might have on competitors. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[6] MONOPOLIES ⚷28(7.5)
265k28(7.5)
Formerly 265k28(7.4)
To establish predatory pricing, plaintiff must prove that anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance firm's long-term ability to reap benefits of monopoly power; if defendant's prices were below average total cost but above average variable cost, plaintiff bears burden of showing defendant's pricing was predatory; if, however, plaintiff proves that defendant's prices were below average variable cost, plaintiff has established prima facie case of predatory pricing and burden shifts to defendant to prove that prices were justified without regard to any anticipated destructive effect they might have on competitors. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[7] MONOPOLIES ⚷17(1.8)
265k17(1.8)
Motive or intent is distinguishing characteristic of predatory pricing; predatory pricing differs from healthy competitive pricing in its motive, in that predator by his pricing practices seeks to impose losses on other firms, not garner gains for itself. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[8] MONOPOLIES ⚷17(1.8)
265k17(1.8)
Sherman Act liability cannot be premised on alleged predatory pricing without some evidence that defendant has charged prices below its total cost for product sold. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[9] MONOPOLIES ⚷17(1.8)
265k17(1.8)
Although substantial evidence indicated that defendant's chief officer intended to eliminate competition and dominate market, defendant was not guilty of predatory pricing, where defendant never bid below its own cost and continually made profits on its ventures. Sherman Anti-Trust Act, § 2, 15 U.S.C.A. § 2.

[10] MONOPOLIES ⚷24(14)
265k24(14)
In action for violations of section seven of Clayton Act, issue of whether plaintiff's injuries resulted from anticompetitive acts made possible by defendant's acquisitions was properly a jury question. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

[11] MONOPOLIES ⚷24(13)
265k24(13)
With exception of one acquisition, there was no evidence that any company acquired by defendant in asphalt hot-mix business was directly engaged in interstate commerce, as required by section seven of Clayton Act at time of trial. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

[12] MONOPOLIES ⚷24(7.1)
265k24(7.1)
Formerly 265k24(7)
Injunctive relief under section 16 of Clayton Act has three primary purposes: putting an end to illegal conduct; depriving violators of benefits of their illegal conduct; and restoring competition in marketplace. Clayton Act, § 16, as amended, 15 U.S.C.A. § 26.

[13] MONOPOLIES ⚷24(15)

265k24(15)
Section 16 of Clayton Act does not create private divestiture remedy. Clayton Act, § 16, as amended, 15 U.S.C.A. § 26.

[14] FEDERAL COURTS ⚷817
170Bk817
Denial of permissive intervention should be reversed only for clear abuse of discretion. Fed.Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.

[15] FEDERAL CIVIL PROCEDURE ⚷320
170Ak320
In antitrust action, trial court did not abuse its discretion in denying posttrial motion for permissive intervention in injunctive relief hearings sought by sister company of plaintiff which competed in different product market. Fed.Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.
***1052** John M. Curphey (argued), Jack Zouhary, Robison, Curphey & O'Connell, Toledo, Ohio, M. Neal Rains, Arter & Hadden, Cleveland, Ohio, for defendants- appellants, cross-appellees.

Thomas Zraik, Reiser, Jacobs, Zraik & Szyperski, Toledo, Ohio, James Porter (argued), Walter J. Rekstis, III, Squire, Sanders & Dempsey, Cleveland, Ohio, for plaintiffs-appellees, cross-appellants.

Before LIVELY, Chief Judge, WELLFORD, Circuit Judge, and WILHOIT, District Judge. [FN*]

FN* Honorable Henry R. Wilhoit, Jr., U.S. District Court for the Eastern District of Kentucky, sitting by designation.

WELLFORD, Circuit Judge.

Defendants, S.E. Johnson Company (Johnson) and other affiliated entities (referred to collectively as Johnson Companies), appeal the judgments and orders entered by the district court against them following a unanimous jury verdict for plaintiffs in this private antitrust action for alleged violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, and Section 7 of the Clayton Antitrust Act, 15 U.S.C. § 18. Plaintiffs, Arthur S. Langenderfer, Inc. (Langenderfer), and its sister company, Northern Ohio Asphalt Paving Co. (NOAP), claimed defendants had combined and conspired to drive plaintiffs out of business by various monopolistic and anticompetitive practices including, but not limited to, predatory pricing and illegal acquisitions. The jury found actual damages of $982,117.00. The district court trebled the damage award to $2,946,351.00 and enjoined future acquisitions and anticompetitive acts, pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

Defendants contend the district court erred by (1) failing to apply the appropriate legal standard to plaintiff's allegation of predatory pricing; (2) allowing the jury to find a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, on the basis of purely intrastate acquisitions; and (3) allowing damages for losses suffered outside the relevant market and beyond the statute of limitations period. Langenderfer cross-appeals from the district court's refusal to order divestiture and the refusal to allow post-trial intervention by a company affiliated with Langenderfer. We vacate the judgments below because of prejudicial error on the issues of predatory pricing and intrastate acquisitions.

FACTS

Langenderfer and S.E. Johnson were competitors for many years in the business of supplying "hot-mix," [FN1] stone, sand and contracting services for highway construction and repair in northwest Ohio. Most of this work is administered and paid for by governmental bodies which invite competitive bids from paving contractors. [FN2] Federal and state highway projects are administered by the Ohio Department of Transportation (ODOT) and the Ohio Turnpike Commission (OTC) with substantial use of federal funds. [FN3] For the purpose of this appeal ***1053** the parties have stipulated the relevant product and geographic market to be asphalt highway paving contracts awarded by the OTC and ODOT in a thirteen county area of northwest Ohio.

FN1. "Hot-mix" is also known as asphaltic concrete. It is manufactured by combining liquid petroleum with a mixture of sand and crushed limestone at high temperatures.

FN2. State law requires competitive bidding. Ohio Rev.Code Chapters 5525 and 5537. State agencies determine where and whether a project will take place and reserve the right to reject any and all bids.

FN3. The volume of available highway work is directly dependent on the amount of funds allocated to the state highway program. Substantial completion of the interstate highway system in the late 1960's resulted in a significant decrease in funds allocated for new highway construction in Ohio during the 1970's. The highway program in northwestern Ohio during the 1970's was primarily limited to maintaining and upgrading the existing roadways.

Successful bidders must supply all labor, materials, equipment and supervision to do the work at per-unit prices specified in the winning bid. The primary costs in performing paving projects are the cost of materials and the cost of hauling materials to the job site. Contractors attempt to minimize expenses by purchasing materials from the quarry or hot-mix plant closest to the job. [FN4]

FN4. The practical service area of a hot-mix plant is limited to a 25-30 mile radius due to hauling costs and the need to deliver the product at specified temperatures. The plants are typically located at or near quarries because of the high cost of hauling stone.

Plaintiffs, Langenderfer and NOAP are Ohio corporations with all voting stock owned by Burton R. MacRitchie and his two sons. Langenderfer was in the asphalt paving business for 55 years until it discontinued operations in 1978 due to its inability to compete profitably. Unlike many highway contractors, Langenderfer did not diversify its operations but remained an asphalt paving specialist. While Langenderfer was still in business, NOAP had four hot-mix plants in northwest Ohio. The MacRitchie family also owned MacRitchie Materials, Inc., [FN5] which operated a quarry in West Millgrove, Ohio, and supplied stone to two of Langenderfer's hot-mix plants.

FN5. MacRitchie Materials, Inc. is the sister company that unsuccessfully sought to intervene following the trial below.

Defendants are the S.E. Johnson Co. (Johnson), founded as an Ohio corporation in 1929 by Sherman E. Johnson, various associated and subsidiary companies, and John T. Kirkby, the current president of Johnson. Following the Second World War, Johnson established the Maumee Stone Co. and opened a quarry to have an assured source of limestone for road building. The Michigan Stone Co. was set up in 1952 to operate two additional quarries just across the Ohio-Michigan border. With these quarries supplying raw materials and with three hot-mix plants to service the area, Johnson was already the largest asphalt paving contractor in northwest Ohio by the time of Sherman Johnson's death in 1956.

Defendant, John T. Kirkby, succeeded Mr. Johnson as president and operating head of the defendant companies. He soon began an ambitious acquisition program, acquiring twelve different companies within a fifteen year period.

In 1961, Johnson purchased C.P. Calaway, Inc., an independent bridge contractor. This enabled it to perform its own bridge work rather than subcontracting to other companies.

Mr. Kirkby then turned his attention to vertical acquisitions of raw material sources in northwest Ohio. Defendant Maumee Stone acquired the quarries of Wood County Stone & Construction Co. (1961), Lime City Stone Co. (1962), and Auglaize Stone Co. (1965). Maumee Stone opened the Rocky Ridge quarry under a 25-year lease in 1970. In 1974, defendants acquired the Tri-State Sand & Gravel Co., which is described as the most important source of quality sand in northwest Ohio.

In the late 1960's Johnson began a series of horizontal acquisitions of asphalt paving competitors. In 1969 Johnson purchased paving equipment from the Price Construction Co., including two hot-mix plants that served three counties to the east of Toledo. When Price moved a third hot-mix plant to Maumee to compete with defendants' operation, Mr. Kirkby offered to buy out Price, but Price agreed not to compete for ten years. Johnson purchased Ohio Engineering Co. in 1970 and thereby acquired three hot-mix plants that served several counties south of Toledo. Fred R. Creager & Sons, a small contractor on the verge of bankruptcy, was purchased in 1971 for $1 and an assumption of liabilities. Johnson bought two plants and certain gravel leases in 1972 from Northwest Materials, Inc., ***1054** which was being liquidated at the time. Except for Creager, each competitor was a viable, profitable, ODOT-qualified paving contractor. Each company except Northwest Materials was acquired under a contract whereby the sellers agreed not to compete with Johnson for a number of years. In 1979, just prior to the trial below, defendants paid $3.5 million for Union Quarries Co., a profitable competitor that owned a quarry, a hot-mix plant and an asphalt paving business that served three counties in northwest Ohio.

Substantial evidence indicated that Kirkby, both individually and as chief officer of Johnson, intended to eliminate competition and dominate the market. In addition to the noncompetition agreements previously mentioned, there was considerable testimony that Kirkby or his agents had threatened or coerced several smaller competitors. Kirkby allegedly told one competitor that if he built an asphalt plant to compete with the Maumee plant, defendants would immediately build a larger facility across the street to drive the competition out of business. Another competitor who planned to build a hot-mix plant was told that defendant would not supply the necessary stone for operation of the plant. On another occasion, Kirkby allegedly said that he did not like Langenderfer or Miller (another competitor) and wanted to run them out of business.

Langenderfer presented expert testimony from several economists to the effect that Johnson's acquisitions significantly reduced competition and increased market concentration, thereby creating a monopolistic market structure. Statistical evidence does support this testimony. Defendants' average annual share of ODOT and OTC projects from 1966-1971 was 46.9%, but they took well over half of the available work during the 1972-78 period. [FN6] Johnson Companies did 75.8% of all turnpike paving in northwest Ohio during this period.

FN6. Defendants' annual shares of the relevant ODOT and OTC projects were as follows: 1972--65.3%; 1973--57.6%; 1974--82.5%; 1975--53.2%; 1976-- 62.6%; 1977--70.4%; 1978--51.3%.

In summary, Kirkby expanded operations of the Johnson Companies from two quarries and three hot-mix plants to seven quarries, fourteen hot-mix plants, and three sand pits. The horizontal acquisitions eliminated a noticeable segment of Johnson Companies' competition, and the vertical acquisitions gave defendants a captive supply of stone and sand for its asphalt paving jobs. Furthermore, defendants became primary stone suppliers for the remaining asphalt paving competitors who did not own conveniently located quarries. As Johnson increased its share of the ever decreasing market, it also increased its profitability. From 1970 to 1978, its annual net profits more than doubled--from $1.168 to $2.717 million. During this same period, the Johnson Companies' competitors went from a combined net profit of $655,000 to a combined net loss.

Langenderfer's claims of unreasonable restraint of trade in violation of Section 1 of the Sherman Act, monopolization and conspiracy or attempt to monopolize in violation of Section 2 of the Sherman Act, and illegal anticompetitive acquisitions in violation of Section 7 of the Clayton Act were all submitted to the jury. In support of the Sherman Act claims, Langenderfer alleged twelve separate monopolistic acts including, among others, predatory pricing, monopolistic pricing, price discrimination, exclusive dealing, refusals to deal, tying, and profit squeezing. The trial court denied defendants' request for special interrogatories. In returning the general verdict in favor of Langenderfer the jury was not required to specify which portions of the Sherman and/or Clayton Acts were violated nor which of the various alleged monopolistic acts were committed by appellants.

PREDATORY PRICING

[1][2][3] In order to recover under Section 2 of the Sherman Act, whether for monopolization [FN7] ***1055** or an attempt to monopolize, [FN8] Langenderfer had to establish that Johnson engaged in some type of prohibited anticompetitive conduct. D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co., 692 F.2d 1245 (9th Cir.1982). Langenderfer alleged several different kinds of anticompetitive acts, but the evidence presented at trial clearly focused on the claim of predatory pricing. [FN9] As the district court stated in the January 27, 1981, Final Judgment for Injunctive Relief:

FN7. To establish monopolization of the ODOT-OTC asphalt paving market, Langenderfer had to prove that Johnson unfairly attained or maintained monopoly power. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04, 16 L.Ed.2d 778 (1966). Monopoly power is "the power to control prices or exclude competition." Id. at 571, 86 S.Ct. at 1704.

FN8. To establish that Johnson attempted to monopolize the ODOT-OTC asphalt paving market, Langenderfer had to prove that appellant "engaged in anticompetitive conduct with the specific intent to monopolize and that the attempt had a dangerous probability of success." Richter Concrete Corp. v. Hilltop Corp., 691 F.2d 818, 823 (6th Cir.1982), (quoting United States v. Dairymen, Inc., 660 F.2d 192, 194 (6th Cir.1981)).

FN9. Support for the allegations of other types of anticompetitive conduct was meager at best. Although injunctive relief was granted against a broad array of wrongful acts, the trial court made the following observation about Langenderfer's proof:
Plaintiffs request injunctions against certain anticompetitive practices of the defendants which were not specifically proven by evidence at trial. For example, plaintiffs seek prohibitions against the defendants' alleged practices of charging discriminatory stone prices, refusing to sell stone or sand to plaintiffs, and tying sales of asphaltic concrete to purchases of stone and sand. (emphasis added)

The major thrust of much of the evidence at trial was aimed at the predatory nature of defendants' bidding on ODOT and OTC projects. At trial, plaintiffs vigorously attempted to show how defendants deliberately excluded competition by bidding low and deliberately sacrificing short term profits for the purpose of driving rivals out of business.

[4][5] Defendants contend that as a matter of law, predatory pricing was not established because Langenderfer presented no evidence that Johnson ever submitted a bid for an ODOT or OTC project at less than cost plus overhead. [FN10] In fact, defendants consistently made a profit on their successfully bid state highway and turnpike projects. Nevertheless, the district court denied Johnson's motion for a directed verdict on the issue and chose not to instruct the jury on the legal test for predatory pricing. [FN11] Instead, the trial court "felt it was appropriate to let the jury decide where that line was to be drawn." We conclude from all the evidence, however, that the trial court erred by failing to grant a directed verdict in favor of defendants on the issue of predatory pricing.

FN10. Langenderfer attempts to rely on the testimony of Howard Shank who was Johnson's Vice President and chief bidding estimator. Shank testified that in preparing bids, he often programmed specific items below cost. The relevant product in this case, however, was the total package of asphalt paving materials and services, not specific line items in a contract bid. It matters little that Johnson might have employed a below-cost figure for gravel or any other item so long as the final bid exceeded the company's total projected costs.

FN11. Even if the evidence had been sufficient to avoid a directed verdict, the trial court's failure to instruct the jury on the legal standard for predatory pricing was erroneous. "The choice of a cost-based standard for evaluating claims of predatory pricing is a question of law to be decided by the trial judge." M.C.I. Communications Corp. v. A.T. & T. Co., 708 F.2d 1081, 1111 (7th Cir.1983).

While we recognize the basis for Judge Wilhoit's concern as to predatory pricing, we are unpersuaded by his argument. If a producer has achieved greater efficiency due to his economies of scale, it would be contrary to the purposes of the Antitrust laws to require that he price his product at a level higher than what he requires to make a profit. Johnson continually made profits on its ventures. This is not a case where the defendant failed to account for his long term overhead costs in making his bids. The bids were above the total average costs. To require that Johnson's bids be above competitors' costs would deprive Johnson (and others similarly situated) of ***1056** reward from greater efficiency. This would serve only to stifle the incentive to compete. [FN12] Such cannot be the aim of the Antitrust laws of this country. See, MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir.1983); Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir.1976), cert. denied, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977).

FN12. Further support for this decision may be drawn from Judge Kennedy's dissent in Borden, Inc. v. F.T.C., 674 F.2d 498, 519 (6th Cir.1982). While that case dealt with the manipulation of a price premium for a heavily advertised product, not below cost pricing, it was noted by that Judge that "business acumen includes shrewdness in profitable price competition, which is pricing above average variable cost; the Sherman Act does not distinguish competition on the basis of price and performance." Id., citing California Computer

Products v. International Business Machines Corp., 613 F.2d 727, 742-43 (9th Cir.1979). See also Areeda & Turner, "Predatory Pricing and Related Practices under Section 2 of the Sherman Act," 88 Harv.L.Rev. 697 (1975). Professor (now Judge) Posner would also agree that there is no violation where a monopolist sells above average total cost, as in the instant case. R. Posner, Antitrust Law: An Economic Perspective, 188 (1976), cited in Borden, Inc. v. F.T.C., 674 F.2d at 519 n. 3. (Kennedy, dissenting).

[6] At the time of the trial below, this Circuit had not definitely declared a standard for evaluating claims of predatory pricing. Subsequently, however, a cost-based standard was adopted in D.E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d 1431 (6th Cir.1983), this court selected the Ninth Circuit's modification of the "Areeda/Turner" rule. See Areeda & Turner, Predatory Pricing & Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697 (1975) (Pricing below marginal or average variable cost presumed predatory while pricing above marginal or average cost conclusively presumed legal). The Ninth Circuit standard was set forth in William Inglis v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir.1981), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982):

> [W]e hold that to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.

Id. at 1035-36. Although this Circuit has adopted the above standard, we reject the Ninth Circuit's recent extension of that standard in Transamerica Computer Co. v. I.B.M. Corp., 698 F.2d 1377 (9th Cir.1983) (pricing above average total costs may be deemed predatory upon clear and convincing proof of predatory intent).

Langenderfer's theory at trial (and in this appeal) was that defendants intentionally and consistently bid below the cost level of smaller competitors. Allegedly, Johnson could have submitted higher bids and still won the paving contracts, but it "left money on the table" in order to make it impossible for other firms to compete. Although Johnson never bid below its own cost, it supposedly engaged in a pattern of predation by forcing competitors to choose between foregoing sales or operating at a loss. No doubt this was an unpleasant choice for smaller firms such as Langenderfer, but Johnson cannot be found to have committed predatory pricing simply because it was more cost efficient than its competitors and could afford to submit a lower bid on the jobs in question. "It is the very nature of competition that the vigorous, efficient firm will drive out less efficient firms. This is not proscribed by the antitrust laws." Janich Brothers, Inc. v. American Distilling Co., 570 F.2d 848, ***1057** 855 (9th Cir.1977), cert. denied, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978).

[7] Langenderfer's argument is premised on the false belief that predatory pricing may be found solely on the basis of the seller's intent. We agree that motive or intent is the distinguishing characteristic of predatory pricing, as this Circuit stated in Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818 (6th Cir.1982):

> Predatory pricing differs from healthy competitive pricing in its motive: "a predator by his pricing practices seeks 'to impose losses on other firms not garner gains for itself.' " Malcolm v. Marathon Oil Co., 642 F.2d 845, 853- 54 (5th Cir.), cert. denied, 454 U.S. 1125, 102 S.Ct. 975, 71 L.Ed.2d 113 (1981) (footnote omitted).

691 F.2d at 823. Any definition of predatory pricing, however, must also accommodate the economic policies of the antitrust laws to promote efficiency, encourage vigorous competition and maximize consumer welfare.

The rule advocated by Langenderfer would work contrary to these goals by forcing a larger, more efficient firm to maintain artificially high prices to the detriment of the public. In MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir.1983), the court thoroughly reviewed the multiple evils that such a rule would occasion:

> MCI nonetheless argues in its cross-appeal that the district court erred in requiring it to prove that AT

& T priced its Hi-Lo service below any measure of cost. MCI contends that if AT & T knowingly sacrificed revenue (i.e., failed to maximize its profits) with the intent to injure competition, this court should hold that behavior to constitute unlawful predatory pricing. In support of this "profit maximization" theory, MCI cites a trio of cases. Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 n. 5 (9th Cir.1976), cert. denied, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977); International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir.1975), cert. denied, 424 U.S. 943, 96 S.Ct. 1411, 47 L.Ed.2d 349 (1976); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F.Supp. 423, 432 (N.D.Cal.1978), aff'd. per curiam sub nom. Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir.1980), cert. denied, 452 U.S. 972, 101 S.Ct. 3126, 69 L.Ed.2d 983 (1981).

Each of these cases contains language to the effect that a price may be predatory if it is below the short-run profit-maximizing price and barriers to new entry are great. Assuming, arguendo, that these statements are more than mere dicta, we must reject such a "profit maximization" theory as incompatible with the basic principles of antitrust. The ultimate danger of monopoly power is that prices will be too high, not too low. A rule of predation based on the failure to maximize profits would rob consumers of the benefits of any price reductions by dominant firms facing new competition. Such a rule would tend to freeze the prices of dominant firms at their monopoly levels and would prevent many pro-competitive price cuts beneficial to consumers and other purchasers. In addition a "profit maximization" rule would require extensive knowledge of demand characteristics--thus adding to its complexity and uncertainty. Another, and related, effect of adopting the "profit maximization" theory advocated by MCI would be to thrust the courts into the unseemly role of monitoring industrial prices to detect, on a long term basis, an elusive absence of "profit maximization." Such supervision is incompatible with the functioning of private markets. It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition. See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir.1979), cert. denied, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). We therefore reject MCI's "profit maximization" theory and reaffirm this Circuit's holding that liability for predatory pricing must be based upon proof of pricing ***1058** below cost. Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir.1980).

Id. at 1114 (footnote omitted). As more succinctly stated in Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir.1976), cert. denied, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977):

> The antitrust laws were not intended, and may not be used, to require businesses to price their products at unreasonably high prices (which penalize the consumer) so that less efficient competitors can stay in business. The Sherman Act is not a subsidy for inefficiency.

Id. at 1358-59. We agree with this rationale expressed in the MCI and Hanson cases.

[8][9] Johnson attained economies of scale which enabled it to operate at a much lower cost per paving project than its competitors. On the basis of the record presented, we can express no opinion about whether this position of strength may have resulted from some other types of prohibited anticompetitive acts. We hold only that, as a matter of law, Sherman Act liability cannot be premised on alleged predatory pricing without some evidence that a defendant has charged prices below its total cost for the product sold. Since Langenderfer premised its allegation of anticompetitive conduct almost entirely on the claim of predatory pricing and since the jury was not required to return special interrogatories, we cannot discern whether the jury verdict was based on the legally insufficient proof of predatory pricing or on the other allegations of anticompetitive acts. Consequently, we must vacate the judgment below and remand for new trial.

ACQUISITIONS

Johnson raises two arguments against assessment of liability for violations of Section 7 of the Clayton Act. First, defendants note that six of the acquired companies [FN13] rarely, if ever, competed with Langenderfer before they were acquired by Johnson. Consequently, they claim the acquisitions had no "anticompetitive effect" on Langenderfer as required under Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). We find the argument unpersuasive because appellant mistakenly focuses on past competition between Langenderfer and the acquired companies, and because appellant has misinterpreted the holding in Brunswick.

FN13. C.P. Calaway, Inc., Price Construction Co., Ohio Engineering, Fred R. Creager & Sons, Northwest Materials, Inc. and Union Quarries Company.

[10] The plaintiff in Brunswick sought to recover profits it claimed it would have reaped if Brunswick had not acquired and revitalized several failing bowling alleys that competed with plaintiff. Since the antitrust laws were never intended to provide redress for injury caused by increased competition, the court rejected plaintiff's theory.

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which made defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Id. at 489, 97 S.Ct. at 697. Brunswick does not require proof that the acquisitions had an "anticompetitive effect" on Langenderfer. Instead, Brunswick requires that Langenderfer's injury result either from a lessening of competition due to the acquisitions or from "anticompetitive acts made possible" by the acquisitions. One of Langenderfer's theories at trial was that the acquisitions eliminated the competitive pressures of the acquired companies and enabled defendants to engage in other monopolistic acts such as monopolistic pricing, profit squeezing, and predatory bidding. If true, this alone satisfies the requirement of Brunswick. Absent other error regarding the Clayton Act cause of action, the issue of whether Langenderfer's injuries resulted from "anticompetitive acts made ***1059** possible" by the acquisitions was properly a jury question.

Johnson next argues that none of the acquisitions met the jurisdictional requirement of Section 7 of the Clayton Act. At the time of trial the statute was limited to corporate acquisitions where both the acquiring and the acquired companies engaged in interstate commerce. [FN14] The district court granted Langenderfer's motion for a directed verdict as to Clayton Act jurisdiction because the companies all performed work on interstate highways. The court clearly erred.

FN14. The statute was amended in 1980 to expand jurisdiction to acquisitions in which both the acquiring and the acquired companies are "engaged in commerce or in any activity affecting commerce." Pub.L. No. 96-349, § 6(a), 94 Stat. 1157. Section 6(b) of Pub.L. No. 96-349 limited application of the amendment to acquisitions made after September 12, 1980.

In United States v. American Building Maintenance Industries, 422 U.S. 271, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975), the Supreme Court held that the Clayton Act, unlike the Sherman Act, does not reach companies engaged in purely intrastate activities even though there may be a substantial effect on interstate commerce. Langenderfer relies on Fort Lauderdale v. East Coast Asphalt Corp., 329 F.2d 871, 872 (5th Cir.), cert. denied, 379 U.S. 900, 85 S.Ct. 187, 13 L.Ed.2d 175 (1964), for the rule that "contractors engaged in the construction of interstate highways and other facilities of interstate commerce are engaged 'in commerce.' " That "rule" is no longer valid, however, in light of Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974). In Copp Paving, the Court reviewed the uniquely localized nature of asphalt hot-mix markets and held that intrastate sales of asphalt for use on interstate highways was not alone sufficient to establish jurisdiction under the Clayton Act.

[11] With the exception of Union Quarries Co., there is no evidence in the record that any of the acquired companies were directly engaged in interstate commerce. Langenderfer apparently chose to rely solely on the interstate highway nexus, as did the district court. As noted above, this was clear error under American Building Maintenance and Copp Paving. Based on the evidence presented at trial, the district court erred by granting a directed verdict in favor of Langenderfer, and by denying a directed verdict for Johnson Companies on the Clayton Act cause of action as to all of the acquisitions except Union Quarries Co.

Because of errors on the issues of Clayton Act jurisdiction and predatory pricing we conclude that we must vacate the judgment below. Consequently, we find it unnecessary to address appellants' arguments regarding the scope of damages allowed, and we express no opinion about the possible merits of those arguments.

DIVESTITURE

On cross appeal Langenderfer contends the trial court erred by refusing to order divestiture of Union Quarries, Tri-State Sand & Gravel, two of Johnson's six quarries, and four of Johnson's twelve hot-mix plants. The district court held that the drastic remedy of divestiture was not necessary to restore competition. The court also doubted its authority to grant divestiture in favor of a private plaintiff under Section 16 of the Clayton Act.

[12] Langenderfer correctly observes that Section 16 injunctive relief has three primary purposes: "(1) putting an end to illegal conduct, (2) depriving violators of the benefits of their illegal conduct, and (3) restoring competition in the marketplace." In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 234 (9th Cir.1976) (citing Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128-29, 68 S.Ct. 947, 957-58, 92 L.Ed. 1245 (1948)). We cannot, however, agree with Langenderfer's claim that the trial court's injunction against future acquisitions and anticompetitive acts only furthers the first of these purposes. Assuming culpability on the part of Johnson Companies, we believe the district court's injunction not only would deprive them of the primary benefits of their past ***1060** conduct--continued growth through acquisitions and guaranteed market dominance for the future--but also would serve to bring about a greater degree of competition by eliminating the barriers allegedly erected. In any event, the fact that the remedy fashioned by the district court may have served certain purposes to a lesser extent than others provides no ground for assignment of error.

[13] The more fundamental flaw in Langenderfer's argument is the proposition that divestiture is an available remedy in a suit instituted by a private plaintiff. Although several district courts have suggested that the remedy should be available, no court of appeals has so held. We find compelling the Ninth Circuit's decision, based on the legislative history of Section 16, that the statute does not create a private divestiture remedy. I.T. & T. Corp. v. G.T.E. Corp., 518 F.2d 913, 920-24 (9th Cir.1975). See also, Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 692-94 (9th Cir.1976); Continental Securities Co. v. Michigan Central Ry. Co., 16 F.2d 378, 379-80 (6th Cir.1926).

PERMISSIVE INTERVENTION

MacRitchie Materials Co., a quarry operator and sister company of Langenderfer, filed a post-trial motion for permissive intervention in the injunctive relief hearings pursuant to Fed.R.Civ.P. 24(b). MacRitchie argued that it had an interest in the injunction proceedings because its own business interests were affected by Johnson's monopolistic practices. The district court found that MacRitchie's claims did not present sufficiently common questions of law and fact as had been addressed during trial and, accordingly, denied the motion. Claiming error, MacRitchie has cross-appealed the trial court ruling.

[14][15] "[T]he denial of permissive intervention should be reversed only for clear abuse of discretion." FMC Corp. v. Keizer Equipment Co., 433 F.2d 654, 656 (6th Cir.1970); Brewer v. Republic Steel Corp., 513 F.2d 1222 (6th Cir.1975). We find no abuse of discretion in this case. The trial below focused on the impact of Johnson's practices on a particular competitor in the asphalt paving market. MacRitchie, a different competitor in a different product market, cannot now complain about the denial of a post-trial motion filed four years after commencement of this action.

For the reasons set forth above, the judgment of the district court is VACATED and this case is REMANDED for retrial.

WILHOIT, District Judge, dissenting.

I respectfully dissent from the Court's view that as a matter of law, Sherman Act liability on the basis of predatory pricing cannot be proven without some evidence that a defendant has charged prices below its average total cost. This circuit has previously taken the view that evidence of intent to predatorily price can be proven either by direct evidence (subjective proof) or by indirect evidence, through analysis, of whether a defendant was pricing above or below average variable cost (objective proof). The latter analysis provides a surrogate measurement for marginal cost at output levels at or near a firm's optimal level of production. See D.E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d 1431 (6th Cir.1983); Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818 (6th

Cir.1982); Borden, Inc. v. Federal Trade Commission, 674 F.2d 498 (6th Cir.1982). [FN1]

FN1. As the Court notes in its opinion, this Circuit has recently adopted the Ninth Circuit's modified "Areeda/Turner" rule. See ante at 1056. Areeda and Turner first propounded a most influential discussion of how a determination of average variable costs can fairly approximate marginal cost at output levels at or near a firm's optimal level of output. That level, of course, is where a firm is producing at its minimum average costs. Areeda & Turner, Predatory Pricing & Related Practices Under Section 2 of the Sherman Act, 88 Harv.L.Rev. 697 (1975).
D.E. Rogers, 718 F.2d 1431, the case in which this circuit adopted the modified "Areeda/Turner" rule, makes no mention of what the rule should be in situations where, as here, the defendant was pricing at a level above average total cost. Areeda and Turner would presume such to be legal. The majority today agrees. I do not, however, because I believe evidence of intent in circumstances such as presented in this case should play a substantial role in determining whether predatory pricing has occurred.

***1061** The Court takes a different approach today. It says, in effect, that irrespective of any direct evidence of intent to predatorily price, if a defendant can prove objectively that his prices were above his average total costs, his conduct is per se legal. This gives me pause. What the Court seems to do is to create a "free zone" in which monopolists can exploit their power without fear of Sherman Act scrutiny or sanctions. Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1387 (9th Cir.1983).

The fact is that the question of proving average variable and fixed costs can be most difficult. Indeed, another panel of this court recently confronted a perfect example of just how hard it is to allocate "costs" in antitrust cases. See D.E. Rogers, 718 F.2d at 1435. In that case there was a great deal of argument as to what should be included in the average cost figures. Due to the inherent uncertainty and imprecision in determining "cost," I am persuaded by the view expressed by the Ninth Circuit Court of Appeals in that it is simply unwise to create a per se legal zone of predatory pricing irrespective of other conduct and circumstances. See Transamerica, 698 F.2d at 1387. To do so simply encourages litigants to skewer their accounting data to be above or below average total cost.

Beyond these practical problems of proof, the record in this case convinces me that Johnson was found to be guilty of monopolistic practices, including predatory pricing. The evidence is clear that Johnson specifically intended to drive Langenderfer out of business. Moreover, Johnson's rapid and numerous vertical as well as horizontal acquisitions documents well that it had the power to carry out this intent.

The alleged predatory pricing in this case was nothing more than a manifestation of Johnson's monopoly power. The majority readily admits that Johnson had "attained economies of scale which enabled it to operate at a much lower cost per paving project than its competitors." Ante at 1058. It is clear, therefore, that Johnson possessed substantial market power over its competitors, market power which when coupled with the evidence of Johnson's increasing market share (from 46.9% to 75.8%) indicates it undoubtedly possessed monopoly power.

Because Johnson possessed monopoly power, the only other issue for purposes of determining § 2 Sherman Act liability is whether Johnson acquired or maintained that power willfully and intentionally as opposed to mere growth due to a superior product or business acumen. See United States v. Grinnell Corp., 384 U.S. 563, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). In this case, I believe that Johnson willfully and intentionally used its inordinate market power to acquire and maintain a monopoly. Direct evidence of its intent substantiates this. But more importantly, Johnson's conduct establishes it in my mind beyond all doubt.

In an industry such as involved here, entrance barriers are unusually high. Start-up costs are enormous. Moreover, Johnson raised these entrance barriers even higher by its many vertical acquisitions. Competitors and potential competitors were discouraged from competing with Johnson because they had to get their supplies from Johnson.

In addition, because of Johnson's ability to operate at lower costs, a perfect climate existed for Johnson to predate. Johnson was able to bid paving contracts at price levels above its average total costs but low enough to drive competitors out of the market and discourage potential competitors from entering. This practice has sometimes been called "limit pricing" and the fear that a monopolist might undertake it was what probably inspired the Ninth Circuit in Transamerica. [FN2]

FN2. In Transamerica, 698 F.2d at 1387, the Ninth Circuit discusses how, in an industry where a substantial initial investment is required, a monopolist could predate with a pricing strategy that is above average total cost but below the profit maximizing price of competitors or potential competitors. This strategy is labeled "limit pricing", and appears to be the type of strategy employed by Johnson here.

***1062** The majority lays aside the many circumstances raised in this case and focuses instead on the pristine economic view that pricing at or above average total cost is what competition is supposed to effect.

Unfortunately, the real world is not as it is always assumed in economics. If predatory pricing were the only allegation made in this case and there were no other evidences of monopoly power or monopolistic conduct and intent, I would agree with the majority. Predatory pricing cannot and should not be a competitor's complaint absent an abundance of evidence suggesting the alleged predator not only has the intent to predate, but also the ready ability, as in this case, to carry predation out. Cf. Transamerica, 698 F.2d at 1388. [FN3]

FN3. The Transamerica case's so-called "extension," see ante at 1056, of William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir.1981), cert. denied, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 61 (1982), which the majority today refuses to follow, is the natural outgrowth of the Inglis case. The Ninth Circuit has consistently indicated, even prior to Inglis, that given the right set of facts concerning a defendant's motive and conduct, it might very well hold a limit pricing strategy impermissible. See California Computer Product, Inc. v. IBM Corp., 613 F.2d 727, 743 (9th Cir.1979); Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 n. 5 (9th Cir.1976), cert. denied, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977).

The Transamerica case takes the Inglis rule the next logical step and adopts a reasonable view of how to treat an alleged predator's prices that are above its average total cost. It allocates a heavy burden upon the plaintiff to prove by clear and convincing evidence, that the defendant was predatorily pricing. Transamerica, 698 F.2d at 1388. At the same time, however, it does not allow a monopolist, such as Johnson in this case, to escape liability on the basis of predatory pricing merely because it did not price below its average total cost.

The D.E. Rogers, 718 F.2d at 1436, case in this circuit likewise suggests that the Sixth Circuit would not permit a limit pricing scheme at or above average total cost upon a strong showing of motive and/or other monopolistic conduct. While D.E. Rogers does not directly present the issue decided today, it does indicate just as Transamerica's predecessors that "direct evidence bearing on the issue of [a defendant's] motive" is an important consideration. Id. at 1437. Indeed, only because of the absence of, or ambiguous nature of, such direct evidence was a cost-based analysis even resorted to in that case. See id. at 1435.

Nonetheless, as pointed out, I am firmly convinced by the record at hand that Johnson possessed monopoly power and that it used predatory pricing in the form of "limit pricing," among other things such as restrictive contracts and acquisitions, to maintain that monopoly power.

For instance, the majority opinion seems to dismiss the testimony of Howard Shank, Johnson's Vice-President, as mattering little. See ante at 1055 n. 10. The Court's view of Shank's testimony might be correct in other circumstances but on the facts of this case, it overlooks the extent of Johnson's vertical integration. The Court states that "[i]t matters little that Johnson might have employed a below-cost figure for gravel or any other item so long as the final bid exceeded the company's total projected costs." Id. (emphasis in original).

This overlooks the fact that Johnson was probably the only supplier of gravel in the relevant region. It supplied both its own needs and that of its competitors. Johnson could, therefore, raise the price of gravel to its competitors and thereby subsidize sales of gravel to itself. These below-cost line items may very well be a significant indicator of how Johnson was able to keep its "average total cost" figures so low. Having convinced the court that its "costs" were low, indeed lower than its final bid, Johnson has all but successfully defended this action for under the rule announced today, skillful juggling of cost figures has put appellant in the per se legal zone, i.e., pricing above average total costs.

I, therefore, respectfully dissent from the majority's view. I think Johnson possessed monopoly power and intended, as evidenced by its conduct, to maintain that power in contravention of Section 2 of the Sherman Act. I would therefore affirm ***1063** the district court and remand this case only with respect to the question of remedy.

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